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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1986

June 22 Through October 2, 1987

Together With Opinions of Individual Justices in Chambers

End of Term

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATA

480 U. S. 148, running head: "SEVENS" should be "STEVENS".
480 U. S. 631, n. 8, line 14: "501" should be "421".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.*
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.

OFFICERS OF THE COURT

EDWIN MEESE III, Attorney General.
CHARLES FRIED, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
STEPHEN G. MARGETON, Librarian.

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*Justice Powell retired on June 26, 1987. See *post*, p. VII.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES*

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.[1]

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.[2]

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

October 6, 1986.

(For next previous allotment, and modifications, see 453 U. S., p. VI, 459 U. S., p. IV, and 478 U. S., p. V.)

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*For notes, see p. VI.

NOTES

[1] For order of July 31, 1987, assigning THE CHIEF JUSTICE to the Fifth Circuit, in addition to JUSTICE WHITE, effective August 1, 1987, see *post*, p. 1041.

[2] For order of June 26, 1987, vacated by order of July 31, 1987, assigning JUSTICE WHITE to the Eleventh Circuit, see *post*, pp. 1034, 1041. For order of July 31, 1987, vacated by order of September 10, 1987, assigning JUSTICE SCALIA to the Eleventh Circuit, see *post*, pp. 1041, 1053. For order of September 10, 1987, assigning JUSTICE O'CONNOR to the Eleventh Circuit, see *post*, p. 1053.

RETIREMENT OF JUSTICE POWELL

SUPREME COURT OF THE UNITED STATES

FRIDAY, JUNE 26, 1987

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SCALIA.

THE CHIEF JUSTICE said:

Before we turn to the final announcement on today's calendar, we wish to take note with great regret the retirement of Justice Lewis F. Powell as a member of the Court. In due course, all eight of his colleagues will express in the form of a traditional letter their feelings for him as a friend and as a judge, and this letter and his response to it will then be made part of the Journal of the Court's proceedings.

Justice Powell came to the Court after an illustrious career of private practice and public service bespeaking the best traditions of the legal profession. He has now capped that career with fifteen years of able and devoted service as a Justice of this Court. We shall miss his wise counsel in our deliberations, but we look forward to being the continuing beneficiaries of his friendship.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1986

RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-6. Argued April 1, 1987—Decided June 22, 1987

Shortly after his trial for first-degree murder had commenced in an Arizona court, respondent and the prosecutor reached an agreement whereby respondent would plead guilty to second-degree murder and testify against other parties involved in the murder, in return for a specified prison term and a specified actual incarceration time. The agreement also provided that if respondent refused to testify "this entire agreement is null and void and the original charge will be automatically reinstated," and that "[i]n the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement." The trial court accepted the plea agreement and proposed sentence, and respondent testified against the other individuals, who were convicted of first-degree murder. The Arizona Supreme Court reversed the latter convictions, remanding for retrial, and the prosecutor sought respondent's further cooperation but was informed that respondent believed his obligation to testify under the agreement terminated when he was sentenced. After the trial court refused to compel him to testify in pretrial proceedings, the State filed a new information charging him with first-degree murder. The trial court denied his motion to quash the information on double jeopardy grounds, and the Arizona Supreme Court, in special proceedings filed by respondent, vacated his second-degree murder conviction and reinstated the original charges, holding that the plea agreement contemplated availability of his testimony against the other individuals at both trial and retrial, that he had violated the agreement's terms, and that the agreement waived the defense of double jeopardy if it was violated. The State then declined his offer to testify at the other individuals' retrial, he was convicted of first-degree murder and sentenced to death, and the judgment was affirmed on appeal. He then unsuccessfully sought habeas corpus relief in Federal District Court, but the Court of Appeals ultimately held that the State had violated his rights under the Double Jeopardy Clause, concluding that he had not waived such rights by entering into the plea agreement.

Held: Respondent's prosecution for first-degree murder did not violate double jeopardy principles, since his breach of the plea agreement removed the double jeopardy bar that otherwise would prevail, assuming that under state law second-degree murder is a lesser included offense of first-degree murder. Pp. 8–12.

(a) The record establishes that respondent understood the meaning of the agreement's provisions concerning the consequences of his breach of his promise to testify. It is not significant that "double jeopardy" was not specifically waived by name in the agreement, since its terms are precisely equivalent to an agreement waiving a double jeopardy defense. Pp. 9–10.

(b) There is no merit to the view that since there was a good-faith dispute about whether respondent was bound to testify a second time, there could be no knowing and intelligent waiver of his double jeopardy defense until the extent of his obligation was decided. Respondent knew that if he breached the agreement he could be retried, and he chose to seek a construction of the agreement in the State Supreme Court rather than to testify at the retrial. He cannot escape the State Supreme Court's finding that he had breached his promise to testify, and there was no indication that he did not fully understand the potential seriousness of the position he adopted. Cf. *United States* v. *Scott*, 437 U. S. 82. Pp. 10–12.

(c) It is of no moment that following the Arizona Supreme Court's decision respondent offered to comply with the terms of the agreement, since at that point his second-degree murder conviction had been ordered vacated and the original charge reinstated. The parties could have agreed that respondent would be relieved of the consequences of his refusal to testify if he were able to advance a colorable argument that a testimonial obligation was not owing, but permitting the State to enforce the agreement actually made does not violate the Double Jeopardy Clause. P. 12.

789 F. 2d 722, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and POWELL, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 12.

William J. Schafer III argued the cause for petitioners. With him on the brief were *Robert K. Corbin*, Attorney General of Arizona, and *Jack Roberts*, Assistant Attorney General.

Roy T. Englert, Jr., argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson, Charles A. Rothfeld*, and *Kathleen A. Felton*.

Timothy K. Ford argued the cause and filed a brief for respondent.

JUSTICE WHITE delivered the opinion of the Court.

The question for decision is whether the Double Jeopardy Clause bars the prosecution of respondent for first-degree murder following his breach of a plea agreement under which he had pleaded guilty to a lesser offense, had been sentenced, and had begun serving a term of imprisonment. The Court of Appeals for the Ninth Circuit held that the prosecution of respondent violated double jeopardy principles and directed the issuance of a writ of habeas corpus. We reverse.

In 1976, Donald Bolles, a reporter for the Arizona Republic, was fatally injured when a dynamite bomb exploded underneath his car. Respondent was arrested and charged with first-degree murder in connection with Bolles' death. Shortly after his trial had commenced, while jury selection was underway, respondent and the state prosecutor reached an agreement whereby respondent agreed to plead guilty to a charge of second-degree murder and to testify against two other individuals—Max Dunlap and James Robison—who were allegedly involved in Bolles' murder. Specifically, respondent agreed to "testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles . . . ." 789 F. 2d 722, 731 (1986). The agreement provided that "[s]hould the defendant refuse to testify or should he at any time testify untruthfully . . . then this entire agreement is null and void and the original charge will be automatically reinstated." *Ibid.*[1] The parties agreed that respondent would receive a prison sentence of 48–49 years, with a total incarceration time of 20 years and 2 months. In January 1977, the state trial court accepted the plea agreement and the proposed sentence, but withheld imposition of the sentence. Thereafter, respondent testified as obligated under the agreement, and both Dunlap and Robison were convicted of the first-degree murder of Bolles. While their convictions and sentences were on appeal, the trial court, upon motion of the State, sentenced respondent. In February 1980, the Arizona Supreme Court reversed the convictions of Dunlap and Robison and remanded their cases for retrial. *State* v. *Dunlap*, 125 Ariz. 104, 608 P. 2d 41. This event sparked the dispute now before us.

The State sought respondent's cooperation and testimony in preparation for the retrial of Dunlap and Robison. On April 3, 1980, however, respondent's counsel informed the prosecutor that respondent believed his obligation to provide testimony under the agreement had terminated when he was sentenced. Respondent would again testify against Dunlap and Robison only if certain conditions were met, including, among others, that the State release him from custody following the retrial. 789 F. 2d, at 733.[2] The State then informed respondent's attorney on April 9, 1980, that it deemed respondent to be in breach of the plea agreement. On April 18, 1980, the State called respondent to testify in pretrial proceedings. In response to questions, and upon advice of counsel, respondent invoked his Fifth Amendment privilege against self-incrimination. The trial judge, after respondent's counsel apprised him of the State's letter of April 9 indicating that the State considered respondent to be in breach of the plea agreement, refused to compel respondent to answer questions. The Arizona Supreme Court declined to accept jurisdiction of the State's petition for special action to review the trial judge's decision.

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[1] The agreement further provided that, in the event respondent refused to testify, he "will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement." 789 F. 2d, at 731.

[2] Respondent's other conditions—which he characterized as "demands"—included that he be held in a nonjail facility with protection during the retrials, that he be provided with new clothing, that protection be afforded

On May 8, 1980, the State filed a new information charging respondent with first-degree murder. Respondent's motion to quash the information on double jeopardy grounds was denied. Respondent challenged this decision by a special action in the Arizona Supreme Court. That court, after reviewing the plea agreement, the transcripts of the plea hearing and the sentencing hearing, respondent's April 3 letter to the state prosecutor, and the prosecutor's April 9 response to that letter, held with "no hesitation" that "the plea agreement contemplates availability of [respondent's] testimony whether at trial or retrial after reversal," *Adamson* v. *Superior Court of Arizona*, 125 Ariz. 579, 583, 611 P. 2d 932, 936 (1980), and that respondent "violated the terms of the plea agreement." *Ibid.*[3] The court also rejected respondent's

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his ex-wife and son, that a fund be provided for his son's education, that he be given adequate resources to establish a new identity outside Arizona following his release from custody, and that he be granted "full and complete immunity for any and all crimes in which he may have been involved." *Id.*, at 733–734.

[3] The Arizona Supreme Court noted that at oral argument respondent explained for the first time the basis for his refusal to testify. Respondent relied on Paragraph 8 of the plea agreement, which provides: "All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement . . . ." In rejecting respondent's con-

double jeopardy claim, holding that the plea agreement "by its very terms waives the defense of double jeopardy if the agreement is violated." *Id.*, at 584, 611 P. 2d, at 937. Fi-

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tention that this provision relieved him from his obligation to testify after he had already been sentenced, the court referred to the colloquy that occurred at the sentencing hearing. At that hearing, the prosecuting attorney stated that he had discussed with respondent's counsel the fact "that it may be necessary in the future to bring [respondent] back after sentencing for further testimony." 125 Ariz., at 583, 611 P. 2d, at 936. Respondent's counsel indicated that they understood that future testimony may be necessary. The court concluded that whatever doubt was created by Paragraph 8 regarding respondent's obligation to testify after sentencing, the colloquy at the sentencing hearing evinced a "clear understanding" that respondent would be so obligated. *Ibid.* Respondent argued in the Court of Appeals—and renews the argument here—that the "further testimony" mentioned by the prosecutor at the sentencing hearing referred to testimony in a wholly separate prosecution that had yet to be tried. We will not second-guess the Arizona Supreme Court's construction of the language of the plea agreement. While we assess independently the plea agreement's effect on respondent's double jeopardy rights, the construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law, and we will not disturb the Arizona Supreme Court's reasonable disposition of those issues. The dissent's discourse on the law of contracts is thus illuminating but irrelevant. The questions whether the plea agreement obligated the respondent to testify at the retrial of Dunlap and Robison and, if so, whether the respondent breached this duty are matters appropriately left to the state courts. The dissent acknowledges that "deference to the Arizona Supreme Court's construction is appropriate," *post*, at 13, n. 1, but proceeds to engage in plenary review of that court's holding that the respondent breached the agreement. The dissent does not explain the nature of the deference it purports to afford the state courts, and one is unable to detect any such deference in the approach the dissent advocates. And, the dissent misconceives the interrelationship between the construction of the terms of the plea agreement and the respondent's assertion of a double jeopardy defense. As noted previously, once a state court has, within broad bounds of reasonableness, determined that a breach of a plea agreement results in certain consequences, a federal habeas court must independently assess the effect of those consequences on federal constitutional rights. This independent assessment, however, proceeds without second-guessing the finding of a breach and is not a license to substitute a nally, the court held that under state law and the terms of the plea agreement, the State should not have filed a new information, but should have merely reinstated the initial charge. Accordingly, the court vacated respondent's second-degree murder conviction, reinstated the original charge, and dismissed the new information.

After these rulings, respondent offered to testify at the retrials, but the State declined his offer. Respondent sought federal habeas relief, arguing that the Arizona Supreme Court had misconstrued the terms of the plea agreement. The District Court dismissed his petition, the Court of Appeals for the Ninth Circuit affirmed, *Adamson* v. *Hill*, 667 F. 2d 1030 (1981), and we denied respondent's petition for a writ of certiorari. 455 U. S. 992 (1982).

Respondent was then convicted of first-degree murder and sentenced to death. The judgment was affirmed on direct appeal, *State* v. *Adamson*, 136 Ariz. 250, 665 P. 2d 972, and we denied certiorari. 464 U. S. 865 (1983). Respondent sought federal habeas corpus for the second time, asserting a number of claims relating to his trial and sentence. The District Court dismissed the petition; a Court of Appeals panel affirmed. 758 F. 2d 441 (1985). The Court of Appeals went en banc, held that the State had violated respondent's rights under the Double Jeopardy Clause, and directed the issuance of a writ of habeas corpus. The en banc opinion reasoned that respondent had not waived his double jeopardy rights by entering into the plea agreement, asserting that "[i]t may well be argued that the only manner in which [respondent] could have made an intentional relinquishment of a known double jeopardy right would be by waiver 'spread on the record' of the court after an adequate explanation." 789 F. 2d, at 728 (citing *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969)). Even if double jeopardy rights could be waived by implication, no such waiver occurred here since "[a]greeing

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federal interpretation of the terms of a plea agreement for a reasonable state interpretation.

that charges may be reinstituted under certain circumstances is not equivalent to agreeing that if they are reinstituted a double jeopardy defense is waived." 789 F. 2d, at 728. Finally, the court stated that even were the agreement read to waive double jeopardy rights impliedly, no waiver was effected here because a "defendant's action constituting the breach must be taken with the knowledge that in so doing he waives his double jeopardy rights." *Id.*, at 729. Because there was a "reasonable dispute as to [respondent's] obligation to testify," the court continued, "there could be no knowing or intentional waiver until his obligation to testify was announced by the court." *Ibid.* The dissenting judges emphasized that respondent's refusal to testify triggered the second prosecution and the Double Jeopardy Clause "'does not relieve a defendant from the consequences of his voluntary choice.'" *Id.*, at 740 (Brunetti, J., dissenting) (quoting *United States* v. *Scott*, 437 U. S. 82, 99 (1978)). We granted the State's petition for a writ of certiorari to review the Court of Appeals' decision that the Double Jeopardy Clause barred prosecution of respondent for first-degree murder. 479 U. S. 812 (1986).

We may assume that jeopardy attached at least when respondent was sentenced in December 1978, on his plea of guilty to second-degree murder. Assuming also that under Arizona law second-degree murder is a lesser included offense of first-degree murder, the Double Jeopardy Clause, absent special circumstances,[4] would have precluded prosecution of respondent for the greater charge on which he now stands convicted. *Brown* v. *Ohio*, 432 U. S. 161, 168 (1977). The State submits, however, that respondent's breach of the plea arrangement to which the parties had agreed removed the double jeopardy bar to prosecution of respondent on the first-degree murder charge. We agree with the State.

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[4] See, *e. g.*, *Ohio* v. *Johnson*, 467 U. S. 493 (1984); *Jeffers* v. *United States*, 432 U. S. 137, 152 (1977) (plurality).

Under the terms of the plea agreement, both parties bargained for and received substantial benefits.[3] The State obtained respondent's guilty plea and his promise to testify against "any and all parties involved in the murder of Don Bolles" and in certain specified other crimes. 789 F. 2d, at 731. Respondent, a direct participant in a premeditated and brutal murder, received a specified prison sentence accompanied with a guarantee that he would serve actual incarceration time of 20 years and 2 months. He further obtained the State's promise that he would not be prosecuted for his involvement in certain other crimes.

The agreement specifies in two separate paragraphs the consequences that would flow from respondent's breach of his promises. Paragraph 5 provides that if respondent refused to testify, "this entire agreement is null and void and the original charge will be *automatically* reinstated." *Ibid.* (emphasis added). Similarly, Paragraph 15 of the agreement states that "[i]n the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement." *Id.*, at 732. Respondent unquestionably understood the meaning of these provisions. At the plea hearing, the trial judge read the plea agreement to respondent, line by line, and pointedly asked respondent whether he understood the provisions in Paragraphs 5 and 15. Respondent replied "Yes, sir," to each question. App. 23–24, 28–29. On this score, we do not find it significant, as did the Court of Appeals, that "double jeopardy" was not specifically waived by name in the plea agreement. Nor are we persuaded by the court's assertion that "[a]greeing that charges may be reinstituted . . . is not equivalent to agreeing that if they are reinstituted a double jeopardy defense is waived." 789 F. 2d, at 728. The terms of the agreement could not be clearer: in the event of respondent's breach occasioned by a refusal to testify, the parties would be returned to the *status quo ante*, in which case respondent would have *no* double jeopardy defense to waive. And, an agreement specifying that charges may be *reinstated* given certain circumstances is, at least under the provisions of this plea agreement, *precisely* equivalent to an agreement waiving a double jeopardy defense. The approach taken by the Court of Appeals would render the agreement meaningless: first-degree murder charges could not be reinstated against respondent if he categorically refused to testify after sentencing even if the agreement specifically provided that he would so testify, because, under the Court of Appeals' view, he never waived his double jeopardy protection. Even respondent, however, conceded at oral argument that "a waiver could be found under those circumstances . . . ." Tr. of Oral Arg. 42–43.

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[3] We have observed that plea agreements are neither constitutionally compelled nor prohibited: they "are consistent with the requirements of voluntariness and intelligence—because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange." *Mabry* v. *Johnson*, 467 U. S. 504, 508 (1984).

We are also unimpressed by the Court of Appeals' holding that there was a good-faith dispute about whether respondent was bound to testify a second time and that until the extent of his obligation was decided, there could be no knowing and intelligent waiver of his double jeopardy defense. But respondent knew that if he breached the agreement he could be retried, and it is incredible to believe that he did not anticipate that the extent of his obligation would be decided by a court. Here he sought a construction of the agreement in the Arizona Supreme Court, and that court found that he had failed to live up to his promise. The result was that respondent was returned to the position he occupied prior to execution of the plea bargain: he stood charged with first-degree murder. Trial on that charge did not violate the Double Jeopardy Clause. *United States* v. *Scott*, 437 U. S. 82 (1978), supports this conclusion.

At the close of all the evidence in *Scott*, the trial judge granted defendant's motion to dismiss two counts of the indictment against him on the basis of preindictment delay. This Court held that the Double Jeopardy Clause did not bar the Government from appealing the trial judge's decision, because "in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he was accused, suffers no injury cognizable under the Double Jeopardy Clause . . . ." *Id.*, at 98–99. The Court reasoned further that "the Double Jeopardy Clause . . . does not relieve a defendant from the consequences of his voluntary choice." The "voluntary choice" to which the *Scott* Court referred was the defendant's decision to move for dismissal of two counts of the indictment, seeking termination of that portion of the proceedings before the empaneled jury, rather than facing the risk that he might be convicted if his case were submitted to the jury. The respondent in this case had a similar choice. He could submit to the State's request that he testify at the retrial, and in so doing risk that he would be providing testimony that pursuant to the agreement he had no obligation to provide, or he could stand on his interpretation of the agreement, knowing that if he were wrong, his breach of the agreement would restore the parties to their original positions and he could be prosecuted for first-degree murder. Respondent chose the latter course, and the Double Jeopardy Clause does not relieve him from the consequences of that choice.

Respondent cannot escape the Arizona Supreme Court's interpretation of his obligations under the agreement. The State did not force the breach; respondent chose, perhaps for strategic reasons or as a gamble, to advance an interpretation of the agreement that proved erroneous. And, there is no indication that respondent did not fully understand the potential seriousness of the position he adopted. In the April 3 letter, respondent's counsel advised the prosecutor that respondent "is fully aware of the fact that your office may feel that he has not completed his obligations under the plea agreement . . . and, further, that your office may attempt to withdraw the plea agreement from him, [and] that he may be prosecuted for the killing of Donald Bolles on a first degree murder charge." 789 F. 2d, at 733. This statement of respondent's awareness of the operative terms of the plea agreement only underscores that which respondent's plea hearing made evident: respondent clearly appreciated and understood the consequences were he found to be in breach of the agreement.

Finally, it is of no moment that following the Arizona Supreme Court's decision respondent offered to comply with the terms of the agreement. At this point, respondent's second-degree murder conviction had already been ordered vacated and the original charge reinstated. The parties did not agree that respondent would be relieved from the consequences of his refusal to testify if he were able to advance a colorable argument that a testimonial obligation was not owing. The parties could have struck a different bargain, but permitting the State to enforce the agreement the parties actually made does not violate the Double Jeopardy Clause.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The critical question in this case is whether Adamson ever breached his plea agreement. Only by demonstrating that such a breach occurred can it plausibly be argued that Adamson waived his rights under the Double Jeopardy Clause. By simply assuming that such a breach occurred, the Court ignores the only important issue in this case.

I begin by demonstrating that, even if one defers to the Arizona Supreme Court's construction of the plea agreement, one must conclude that Adamson never breached that agreement. I then show that, absent a conscious decision by Adamson to breach his agreement, our cases provide no support for the Court's conclusion that he has waived his rights under the Double Jeopardy Clause.

I

At the heart of this case is a plea bargain, an agreement to be interpreted in a constitutional context. We are asked to define the constitutional rights and responsibilities that arise from the language of that agreement, from the Due Process Clause of the Fourteenth Amendment, and from the Double Jeopardy Clause of the Fifth Amendment. The Court correctly observes that it must "assess independently the plea agreement's effect on respondent's double jeopardy rights." *Ante*, at 6, n. 3. I think that the Court errs, however, in concluding that its assessment can proceed without an independent examination, informed by due process principles, of Adamson's actions under that agreement. *Ibid.* Deferring to the Arizona Supreme Court's construction of the agreement cannot relieve the Court of its responsibility to determine whether, in light of that construction, Adamson can be held to have lost his federal constitutional protection against being placed twice in jeopardy. The requirements of due process have guided this Court in evaluating the promises and conduct of state prosecutors in securing a guilty plea. *Santobello* v. *New York*, 404 U. S. 257 (1971). There is no reason to ignore those requirements here.

A

Without disturbing the conclusions of the Arizona Supreme Court as to the proper construction of the plea agreement,[1] one may make two observations central to the resolution of this case. First, the agreement does not contain an explicit waiver of all double jeopardy protection.[2] Instead, the Arizona Supreme Court found in the language of ¶¶ 5 and 15 of the agreement only an *implicit* waiver of double jeopardy protection which was *conditional* on an act by Adamson that breached the agreement, such as refusing to testify as it required. *Adamson* v. *Superior Court of Arizona*, 125 Ariz. 579, 584, 611 P. 2d 932, 937 (1980). Therefore, any finding that Adamson lost his protection against double jeopardy must be predicated on a finding that Adamson breached his agreement.

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[1] Although in text my argument proceeds on the assumption that deference to the Arizona Supreme Court's construction is appropriate, I note here my view that its construction is premised on an interpretive method that is obviously biased and unfair. In rejecting Adamson's interpretation of the agreement, the Arizona Supreme Court relied not on the plain language of the agreement, which offers the State only modest support, but

Second, Adamson's interpretation of the agreement—that he was not required to testify at the retrials of Max Dunlap and James Robison—was reasonable. Nothing in the plea agreement explicitly stated that Adamson was required to provide testimony should retrials prove necessary. Moreover, the agreement specifically referred in two separate paragraphs to events that would occur only after the conclusion of all testimony that Adamson would be required to give. Paragraph 8 stated that Adamson "will be *sentenced* at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibits A and B, which accompany it." 789 F. 2d 722, 732 (CA9 1986) (emphasis added). At the

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rather on a colloquy that occurred at the time Adamson's plea was taken. See *ante*, at 5–7, n. 3. Yet at the same time that the court went outside "the four corners of the document" in order to uphold the State's view, it denied Adamson's request to introduce other evidence that he maintained would demonstrate that at the time of sentencing the State shared Adamson's understanding of the agreement. *Ibid.* In these circumstances, the Court of Appeals would have been justified in remanding for the evidentiary hearing denied Adamson in state court, and thereafter independently construing the agreement.

[2] Nowhere in the agreement do the words "double jeopardy" appear. Significantly, ¶ 17 of the agreement, which lists the "rights" which Adamson "underst[ood] that he [gave] up . . . by pleading guilty," does not mention the right not to be placed twice in jeopardy. 789 F. 2d 722, 732 (CA9 1986) (reprinting agreement in full).

time that the State demanded that Adamson testify in the retrials, he had been sentenced. Paragraph 18 stated that "[t]he defendant is to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this agreement." *Ibid.* At the time the State demanded that Adamson testify in the retrials, Adamson had been transferred from the custody of the Pima County Sheriff. Adamson therefore could reasonably conclude that he had provided all the testimony required by the agreement, and that, as he communicated to the State by letter of April 3, 1980, the testimony demanded by the State went beyond his duties under the agreement.[3] The Arizona Supreme Court rejected Adamson's construction. But even deferring to the state court's view that Adamson's interpretation was erroneous, one must also agree with the en banc Court of Appeals that Adamson's interpretation of the agreement was "reasonabl[e]," and was supported by the plain language of the agreement, "[l]ogic, and common sense." *Id.*, at 729.

In sum, Adamson could lose his protection against double jeopardy only by breaching his agreement, and Adamson's interpretation of his responsibilities under the agreement, though erroneous, was reasonable. The next step in the analysis is to determine whether Adamson ever breached his agreement.[4]

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[3] Prior to sentencing, Adamson had provided extensive testimony for the State. He testified that he had "made 14 court appearances . . . on five separate cases consisting of approximately 31 days of testimony. . . . Of the 81 or so jurors who have heard my testimony all have returned guilty verdicts in each case resulting in seven convictions. I have been cross-examined under oath for approximately 190 hours . . . by 22 different attorneys. . . . I have cooperated in approximately 205 interrogative sessions. . . . Fifty-five of these have been formal face-to-face in-depth question and answer sessions, approximately." App. 150–151.

[4] It is important to recall that the Court only assumes that such a breach occurred. As I observed at the outset, there is no justification for such an assumption—only by examining whether the alleged breach occurred can

B

This Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements. Nevertheless, it seems clear that the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate. *E. g.*, *Blackledge* v. *Allison*, 431 U. S. 63, 75, n. 6 (1977). It is also clear, however, that commercial contract law can do no more than this, because plea agreements are constitutional contracts. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.

The State argues and the Arizona Supreme Court seems to imply that a breach occurred when Adamson sent his letter of April 3, 1980, to the prosecutor in response to the State's demand for his testimony at the retrials of Dunlap and Robison. See *ante*, at 5. In this letter, Adamson stated that, under his interpretation of the agreement, he was no longer obligated to testify, and demanded additional consideration for any additional testimony. *Ante*, at 4–5, n. 2.

Neither the State, the state courts, nor this Court has attempted to explain why this letter constituted a breach of the agreement.[5] Of course, it could not plausibly be argued that

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the Court "assess independently the plea agreement's effect on respondent's double jeopardy rights." *Ante*, at 6, n. 3. See Part II, *infra*.

[5] The Arizona Supreme Court stated only that "[t]he record before us is replete with indications of petitioner's refusal to testify further in the Bolles murder cases." *Adamson* v. *Superior Court of Arizona*, 125 Ariz. 579, 582, 611 P. 2d 932, 935 (1980). Although the court did not identify what those "indications" were, there appears to be only one other event (besides Adamson's letter of April 3) to which it could have referred. On April 18, 1980, Adamson was called to testify in proceedings prior to the retrial of Dunlap and Robison. *Ante*, at 5. He did not testify, but instead

merely sending such a letter constituted a breach by nonperformance, for nothing in the plea agreement states that Adamson shall not disagree with the State's interpretation of the plea agreement, or that Adamson shall not send the State a letter to that effect.[6] But one *might* argue that, in the language of commercial contract law, the letter constituted a breach by anticipatory repudiation. See Tr. of Oral Arg. 32–33. Such a breach occurs when one party unequivocally informs the other that it no longer intends to honor their contract. "[W]here the contract is renounced before performance is due, and the renunciation goes to the whole contract, is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once." *Roehm* v. *Horst*, 178 U. S. 1, 7 (1900).[7] The reason for the rule is plain: "announcing [one's] purpose to default" destroys the assurance of future performance that is central to a commercial contract.[8]

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invoked his Fifth Amendment privilege. As this Court recounts, Adamson invoked this privilege because the prosecutor had informed him, by letter of April 9, 1980, that the State *already* considered him in breach of his plea agreement and therefore vulnerable to reprosecution. *Ibid.* At the pretrial hearing, the trial judge, apprised of the plea agreement and of the State's letter, refused to grant the State's motion to compel testimony. The trial judge ruled correctly. Once the State declared that Adamson had breached his agreement, and that the State no longer was bound by the agreement, it relinquished any right it otherwise would have had to demand that Adamson continue to adhere to that agreement, i. e., to testify. Therefore, while Adamson did indeed refuse to testify on April 18, he did not thereby breach his agreement.

[6] Indeed, at oral argument the United States, arguing as *Amicus Curiae* on behalf of the State, conceded that the agreement did not bar a good-faith challenge. Tr. of Oral Arg. 19.

[7] See Restatement (Second) of Contracts § 250 (1981); Uniform Commercial Code § 2–610, 1A U. L. A. 321 (1976 and Supp. 1987); J. White & R. Summers, Uniform Commercial Code 212–214 (1980); 4 A. Corbin, Contracts § 973 (1951); 2 S. Williston, Contracts §§ 1322, 1323 (3d ed. 1968).

[8] *Equitable Trust Co.* v. *Western Pacific R. Co.*, 244 F. 485, 502 (SDNY 1917) (L. Hand, J.), aff'd, 250 F. 327 (CA2), cert. denied, 246 U. S. 672 (1918).

In the conventional case of anticipatory repudiation, therefore, the announcement of an intention to default on the contract constitutes a breach.[9] In his letter of April 3, however, Adamson did not announce such an intention. To the contrary, Adamson *invoked* the integrity of that agreement as a defense to what he perceived to be an unwarranted demand by the prosecutor that he testify at the retrials of Dunlap and Robison. And in insisting that he had no obligation to perform as the State demanded, Adamson advanced an objectively reasonable interpretation of his contract.

We have held in the commercial sphere that a letter of the sort that Adamson sent does not constitute anticipatory repudiation. In *New York Life Ins. Co.* v. *Viglas*, 297 U. S. 672 (1936), the Court addressed the question whether an insurance company's *notification* to a policyholder that it would henceforth refuse to continue paying disability benefits constituted a breach of the contract. The Court ultimately found that the company's subsequent *action* to stop payment constituted a breach of the agreement, noting that the insurance company's refusal was based on unfounded facts. *Id.*, at 678. But the Court held that the notification alone did not constitute a breach by repudiation. As Justice Cardozo explained, for a unanimous Court:

> "Repudiation there was none as the term is known to the law. Petitioner did not disclaim the intention or the

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[9] The classic case is *Hochster* v. *De la Tour*, 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853), from which the doctrine of breach by anticipatory repudiation evolved. In that case, De la Tour first contracted to hire Hochster, then prior to the starting date of employment sent Hochster a letter stating that his services would not be needed. The court held that the letter constituted a breach of the contract, and that Hochster did not need to wait until after the starting date to bring suit. In *Roehm* v. *Horst*, this Court discussed *Hochster* at length, and concluded that it provided "a reasonable and proper rule to be applied in this case and in many others." 178 U. S., at 20. Commentators continue to draw on *Hochster* to illustrate the principle. *E. g.*, C. Fried, Contract as Promise 128–130, and n. 25 (1981).

> duty to shape its conduct in accordance with the provisions of the contract. Far from repudiating those provisions, it appealed to their authority and endeavored to apply them. . . . There is nothing to show that the insurer was not acting in good faith in giving notice of its contention that the disability was over." *Id.*, at 676.

The law has been settled since *Viglas* that "[a]n offer to perform in accordance with the promisor's interpretation of the contract although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach." *Kimel* v. *Missouri State Life Ins. Co.*, 71 F. 2d 921, 923 (CA10 1934).[10] As the court in *Kimel* explained:

> "'If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh, or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation.'" *Ibid.* (citation omitted).

Adamson has done no more here to repudiate his plea agreement than did the New York Life Insurance Company in *Viglas*, or the Missouri State Life Insurance Company in *Kimel*. After his lawyers were informed, by telephone, of the State's view that his plea agreement obligated him to testify, he responded with a letter advancing his own reasonable interpretation of the agreement. Although the area of breach by repudiation, like other areas of commercial contract law, is not free from ambiguity,[11] it seems plain that even under commercial contract principles Adamson did not breach his agreement.

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[10] See, *e. g.*, Williston, *supra*, §§ 1322, 1323, pp. 132–133, 136–138 ("[A]n erroneous interpretation, asserted in good faith, will not amount to a breach"); Corbin, *supra*, § 973, p. 911 ("Where the two contracting parties differ as to the interpretation of the contract or as to its legal effects, an offer to perform in accordance with his own interpretation made by one of the parties is not in itself an anticipatory breach").

Of course, far from being a commercial actor, Adamson is an individual whose "contractual" relation with the State is governed by the Constitution. The determination of Adamson's rights and responsibilities under the plea agreement is controlled by the principles of fundamental fairness imposed by the Due Process Clause. To grant to one party—here, the State—the unilateral and exclusive right to define the meaning of a plea agreement is patently unfair. Moreover, such a grant is at odds with the basic premises that underlie the constitutionality of the plea-bargaining system. Guilty pleas are enforceable only if taken voluntarily and intelligently. *E. g., Boykin* v. *Alabama*, 395 U. S. 238 (1969). It would be flatly inconsistent with these requirements to uphold as intelligently made a plea agreement which provided that, in the future, the agreement would mean whatever the State interpreted it to mean. Yet the Court upholds today the equivalent of such an agreement. The logic of the plea-bargaining system requires acknowledgment and protection of the defendant's right to advance against the State a reasonable interpretation of the plea agreement.

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[11] Since *New York Life Ins. Co.* v. *Viglas*, 297 U. S. 672 (1936), courts and commentators have attempted to refine the distinction between advancing a reasonable (but erroneous) interpretation of a contract and repudiating a contract. For example, one court has held that repudiation occurs when a party has "*persistently* demanded an unwarranted condition precedent to its required performance" and thereby evinces a lack of good faith. *Pacific Coast Engineering Co.* v. *Merritt-Chapman & Scott Corp.*, 411 F. 2d 889, 895–896 (CA9 1969) (emphasis added). Others have interpreted the rule expansively. *E. g., Bill's Coal Co.* v. *Board of Public Utilities*, 682 F. 2d 883, 886 (CA10 1982) (upholding party's right to urge even a "bad-faith" interpretation of a clause without thereby causing breach).

Alluding to the difficulty of determining when an erroneous interpretation of a contract has been offered in "good faith," one commentator has recommended abandoning *Viglas* in favor of a standard of strict liability, under which any person who advances an interpretation that ultimately proves erroneous may be held to have repudiated the contract. See E. Farnsworth, Contracts 634–636 (1982). By contrast, another commentator who has acknowledged that same difficulty has nevertheless recognized that "the parties must communicate to clarify or modify the agreement to compensate for defects in the agreement process," and has therefore recommended that "[t]he law . . . be structured to encourage the parties to work out [disagreements over the meaning of the contract] whenever possible through good-faith renegotiation and modification; it cannot hope to achieve this goal if good-faith requests for modification are treated as repudiation." Rosett, Partial, Qualified, and Equivocal Repudiation of Contract, 81 Colum. L. Rev. 93, 108 (1981) (footnote omitted). Of course, even if a policy of strict liability were thought meritorious in the commercial sphere, such a policy would be intolerable in the constitutional context, where the demands of due process, discussed *infra*, require a State to honor a defendant's right to advance a reasonable and good-faith interpretation of an ambiguous plea agreement.

This right requires no exotic apparatus for enforcement. Indeed, it requires nothing more than common civility. If the defendant offers an interpretation of a plea agreement at odds with that of the State, the State should notify the defendant of this fact, particularly if the State is of the view that continued adherence to defendant's view would result in breach of the agreement. If the State and the defendant are then unable to resolve their dispute through further discussion, a ready solution exists—either party may seek to have the agreement construed by the court in which the plea was entered. By following these steps the State would have placed far fewer demands on the judicial process than were in fact imposed here, and would have fulfilled its constitutional obligation to treat all persons with due respect.

C

The unfairness of the Court's decision does not end here. Even if one assumes, *arguendo*, that Adamson breached his plea agreement by offering an erroneous interpretation of that agreement, it still does not follow that the State was entitled to retry Adamson on charges of first-degree murder.

As the Court acknowledges, *ante*, at 7, immediately following the decision of the Arizona Supreme Court adopting the State's construction of the plea agreement, Adamson sent a letter to the State stating that he was ready and willing to testify.[12] At this point, there was no obstacle to proceeding with the retrials of Dunlap and Robison; each case had been dismissed without prejudice to refiling, and only about one month's delay had resulted from the dispute over the scope of the plea agreement. Thus, what the State sought from Adamson—testimony in the Dunlap and Robison trials—was available to it.

The State decided instead to abandon the prosecution of Dunlap and Robison, and to capitalize on what it regarded as Adamson's breach by seeking the death penalty against him. No doubt it seemed easier to proceed against Adamson at that point, since the State had the benefit of his exhaustive testimony about his role in the murder of Don Bolles. But even in the world of commercial contracts it has long been settled that the party injured by a breach must nevertheless take all reasonable steps to minimize the consequent damage. One prominent commentator has explained the rule in this way:

> "If the victim of a breach can protect himself from its consequences he must do so. He has a duty to mitigate damages. . . . This is a duty, a kind of altruistic duty, toward's one's contractual partner, the more altruistic that it is directed to a partner in the wrong. But it is a duty without cost, since the victim of the breach is never worse off for having mitigated. Rather it is a duty that recognizes that contractual duties are onerous enough that they should not be needlessly exacerbated." C. Fried, Contract as Promise 131 (1981) (footnote omitted).

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[12] Conversely, if Adamson had refused to testify at *this* point—after an authoritative construction of the agreement had been rendered—then he could be deemed to have breached his agreement.

Here it is macabre understatement to observe that the State needlessly exacerbated the liability of its contractual partner. The State suffered a 1-month delay in beginning the retrial of Dunlap and Robison, and incurred litigation costs. For these "losses," the State chose to make Adamson pay, not with a longer sentence, but with his life. A comparable result in commercial law, if one could be imagined, would not be enforced. The fundamental unfairness in the State's course of conduct here is even less acceptable under the Constitution.[13]

II

In addition to abdicating its responsibility to consider carefully the contractual and due process elements of this case, the Court does violence to the only area of constitutional law that it does address, double jeopardy. The Double Jeopardy Clause states that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The Court's explanation of how Adamson has waived this protection is unsupported by case law or logic.

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Because we "'indulge every reasonable presumption against waiver' of fundamental constitutional rights," *ibid.*, we generally will enforce only those waivers that are knowing, intelligent, and voluntary. In certain circumstances, however, the Court has enforced waivers of the double jeopardy rights that would not meet this standard. For example, the Double Jeopardy Clause has been held not to bar retrial of a defendant who successfully moves for a mistrial. *United States* v. *Dinitz*, 424 U. S. 600 (1976). In *Dinitz*, the Court reasoned that "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [prejudicial prosecutorial or judicial] error." *Id.*, at 609. In such circumstances, "a defendant might well consider an immediate new trial a preferable alternative to the prospect of a probable conviction followed by an appeal, a reversal of the conviction, and a later retrial." *Id.*, at 610.

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[13] The curious and as yet unexplained decision of the State to abandon prosecution of Dunlap and Robison in favor of Adamson is not unrelated to the question whether the State's actions in this case amount to prosecutorial or judicial vindictiveness. Cf. *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). This question, along with several others, was presented but not decided below, 789 F. 2d, at 725, and should be decided by the Court of Appeals on remand.

In *United States* v. *Scott*, 437 U. S. 82 (1978), the Court extended the logic of *Dinitz* to cases in which the defendant successfully moved to dismiss the indictment "on a basis unrelated to factual guilt or innocence of the offense of which he is accused." 437 U. S., at 98–99. Two reasons supported the judgment. First, as in *Dinitz*, the defendant, in choosing to move to dismiss, retained control over the proceedings. 437 U. S., at 93–94, 98–99. Second, even though dismissal, unlike a mistrial, resulted in a final judgment normally held to bar reprosecution, the Court found it crucial that the proceedings had ended in midtrial, hence "without any submission to either judge or jury as to [defendant's] guilt or innocence." *Id.*, at 101.

> "[In this situation, the defendant] has not been 'deprived' of his valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' *Arizona* v. *Washington*, 434 U. S. [497, 509 (1978)]." *Id.*, at 100.

The Court today relies exclusively on the first rationale of *United States* v. *Scott*. It argues that because Adamson fully understood the implications of breaching his agreement and made a voluntary choice to breach that agreement, he may be held to the consequences of his choice.

Scott alone cannot support the decision here. First, Adamson obviously did not retain control over the course of the proceedings against him. The unexamined assumption of the Court's claim that he did, of course, is that Adamson made a voluntary decision to breach his agreement. For Adamson to have retained control comparable to the control evident in moving for a mistrial or a dismissal, he would have had to have deliberately chosen to breach his agreement. But he never made such a choice. Indeed, as discussed in Part I, *supra*, Adamson never breached his agreement at all. But even assuming that his actions could, in hindsight, be strictly construed to constitute a breach, it is plain that Adamson never took any act that he knew or realized would constitute a breach of the agreement. As a result, the Court's argument that Adamson waived the protection of the Double Jeopardy Clause is untenable. Even under *Scott*, such protection cannot be lost through strict liability.

Second, this case does not involve a midtrial decision by a defendant to terminate the trial. It is therefore not a case in which the public has been deprived of its valued right to one complete opportunity to convict someone charged with breaking the law. Unlike Dinitz, and unlike Scott, Adamson *had* his guilt determined by a court prior to the alleged waiver of double jeopardy. As the Court reiterated in *Scott*, "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment." 437 U. S., at 92. The comparatively limited extent to which *Scott* violated the integrity of a final judgment is itself unique in double jeopardy jurisprudence. See *id.*, at 109, n. 6 (BRENNAN, J., dissenting). But in carving out a limited exception for certain final judgments (those entered in midtrial on grounds other than factual guilt or innocence), the Court in *Scott* offered no reasoning that could be used to undercut the integrity of final judgments as to guilt.

Adamson's interest in protecting the final judgment as to his guilt was substantial. That interest could be protected without compromising society's right to one complete opportunity to obtain a conviction. Adamson did not consciously take any action that would undermine the integrity of that judgment—he did not deliberately choose to breach his plea agreement. Therefore, even if we construe his agreement to contain an implied waiver of double jeopardy protection in the event of a breach, Adamson cannot be held to have waived that protection.

III

The Court's decision flouts the law of contract, due process, and double jeopardy. It reflects a world where individuals enter agreements with the State only at their peril, where the Constitution does not demand of the State the minimal good faith and responsibility that the common law imposes on commercial enterprises, and where, in blind deference to state courts and prosecutors, this Court abdicates its duty to uphold the Constitution. I dissent.

CITICORP INDUSTRIAL CREDIT, INC. *v.* BROCK, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-88. Argued April 20, 1987—Decided June 22, 1987

Section 15(a)(1) of the Fair Labor Standards Act (FLSA or Act) prohibits "any person" from introducing into interstate commerce goods produced in violation of the minimum wage or overtime pay provisions of §§ 6 and 7 of the Act. Under a financing agreement with manufacturer Ely Group, Inc. (Ely), petitioner perfected a security interest in Ely's inventory. After Ely began to fail financially, petitioner took possession of the inventory, part of which was manufactured during a period in which Ely's employees were not paid. Concluding that such items were "hot goods" under § 15(a)(1), the United States Department of Labor filed suits in two Federal District Courts, each of which granted a preliminary injunction prohibiting the transportation or sale of the goods in interstate commerce. The Court of Appeals affirmed the consolidated cases.

Held: Section 15(a)(1) applies to secured creditors who acquire "hot goods" pursuant to a security agreement. Pp. 32-38.

(a) The goods produced during the period when Ely's employees were not paid were manufactured in violation of § 6 and/or § 7 of the Act and are "hot goods" for the purposes of § 15(a)(1). Pp. 32-33.

(b) As a corporate entity, petitioner falls within § 15(a)(1)'s plain language, since that section prohibits "any person" from introducing "hot goods" into commerce, while the Act defines "person" to include corporations. Petitioner's argument that § 15(a)(1)'s exemptions for common carriers and good-faith purchasers reflect a congressional intent that the "hot goods" prohibition should apply only to culpable parties and not to "innocent" secured creditors is not persuasive. Congress' limitation of the effects of other FLSA provisions to culpable parties indicates that its failure to do so here was not inadvertent. Rather, § 15(a)(1)'s exemption of only two narrow categories of "innocent" persons suggests that all others, whether innocent or not, are covered. There is no indication that Congress actually considered secured creditors when it enacted § 15(a)(1), but, by claiming a general exemption for them, without any duty to ascertain compliance with the Act, petitioner would put them in a better position than good-faith purchasers, whom Congress did specifically act to protect. Detailed and particular FLSA exemptions cannot be enlarged by implication to include persons not plainly and unmistakeably within the Act's terms and spirit. Pp. 33–35.

(c) By excluding tainted goods from interstate commerce, the application of § 15(a)(1) to secured creditors furthers the FLSA's goal of eliminating the competitive advantage enjoyed by goods produced under substandard labor conditions. Moreover, prohibiting foreclosing creditors from selling "hot goods" also advances the Act's purpose of establishing decent wages and hours, since such creditors will be encouraged to insist that their debtors comply with the Act's minimum wage and overtime pay requirements. Pp. 35–38.

(d) Applying § 15(a)(1) to secured creditors does not give employees a "lien" on, or priority in, "hot goods" superior to that of the creditors under state law, since creditors' rights in the goods as against the employer are unchanged by such application, while the employees acquire no possessory interest in the goods thereby. Such application is simply an exercise of Congress' power to exclude contraband from interstate commerce. Pp. 38–39.

788 F. 2d 1200, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, BLACKMUN, POWELL, O'CONNOR, and SCALIA, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 40. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 40.

Rex E. Lee argued the cause for petitioner. With him on the briefs were *George W. Jones, Jr.*, and *A. Bruce Schimberg*.

Charles A. Rothfeld argued the cause for respondent. With him on the brief were *Solicitor General Fried*, *Deputy Solicitor General Cohen*, *George R. Salem*, *Allen H. Feldman*, and *Steven J. Mandel*.*

JUSTICE MARSHALL delivered the opinion of the Court.

Section 15(a)(1) of the Fair Labor Standards Act of 1938, 52 Stat. 1068, prohibits "any person" from introducing into

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**Mark I. Wallach*, *Thomas A. Cicarella*, and *Mitchell G. Blair* filed a brief for the National Commercial Finance Association as *amicus curiae* urging reversal.

George Kaufmann and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

interstate commerce goods produced in violation of the minimum wage or overtime provisions of the Act. The question in this case is whether § 15(a)(1) applies to holders of collateral obtained pursuant to a security agreement.

I

In 1983, petitioner entered into a financing agreement with Qualitex Corporation, a clothing manufacturer and the corporate predecessor to Ely Group, Inc., and its subsidiaries Rockford Textile Mills, Inc., and Ely & Walker, Inc. (collectively Ely). Under the terms of the financing arrangement, petitioner agreed to loan up to $11 million to provide working capital for Ely. In return, Ely granted petitioner a security interest in inventory, accounts receivable, and other assets. Petitioner perfected its security interest under applicable state law.

The financing agreement imposed various reporting requirements on Ely, including the submission to petitioner of a weekly schedule of inventory, a monthly balance sheet and income statement, and reports of accounts receivable. Petitioner also monitored the collateral upon which it made cash advances through a system of audits and on-site inspections. In the fall of 1984, Ely's sales began to fall below projections, and the balance on the loan began to increase, reaching over $9.5 million by February 1985. Ely stopped reporting to petitioner in January 1985. On February 8, petitioner stopped advancing funds and demanded payment in full. At the request of Ely's management, however, petitioner did not immediately foreclose. It gave Ely an opportunity to devise a plan for continuing its operations, but Ely was unable to do so. Petitioner waited until February 19, at which time it took possession of the collateral, including Ely's inventory of finished goods.

Ely's employees continued to work until February 19, when Ely ceased all operations and closed its manufacturing facilities. Because Ely defaulted on its payroll, the employees did not receive any wages for pay periods between January 27 and February 19. The Department of Labor concluded that the items manufactured during these times were produced in violation of §§ 6 and 7 of the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §§ 206 and 207, and that under § 15(a)(1), they were "hot goods" that could not be introduced into interstate commerce.[1] Acting on information that petitioner intended to transport these goods in interstate commerce, the Secretary of Labor sought to enjoin shipment.

In an action filed in the United States District Court for the Eastern District of Tennessee, the Secretary moved for a preliminary injunction and sought a temporary restraining order to prohibit Ely and petitioner from placing the goods in interstate commerce. The District Court denied the application for a temporary restraining order but, after a hearing, granted the Secretary's motion for a preliminary injunction. *Donovan* v. *Rockford Textile Mills, Inc.*, 608 F. Supp. 215 (1985). The Under Secretary of Labor then filed another complaint against Ely and petitioner, this time in the United

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[1] Section 15(a)(1) of the FLSA, codified at 29 U. S. C. § 215(a), provides in relevant part:

"(a) [I]t shall be unlawful for any person—

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful."

States District Court for the Western District of Tennessee. This complaint was also accompanied by a motion for a preliminary injunction and application for a temporary restraining order. The District Court granted the temporary restraining order and later granted the Under Secretary's motion for a preliminary injunction. *Ford* v. *Ely Group, Inc.*, 621 F. Supp. 22 (1985).

Both District Courts held that § 15(a)(1), which makes it unlawful for any person to ship "hot goods" in interstate commerce, prohibited not only Ely but also petitioner from transporting or selling items produced by employees who had not been paid in conformity with §§ 6 and 7 of the FLSA. They found this reading of § 15(a)(1) consistent with congressional intent to exclude from interstate commerce goods produced under substandard labor conditions. 608 F. Supp., at 217; 621 F. Supp., at 25–26. The courts concluded that

> "'in light of the purposes of the Act, it would be an unjust and harsh result for the creditor to get the benefit of the labor of the employees during the period of time they produced goods and were not paid as provided by the Act; a benefit which the creditor would not have without the employees['] labor.'" *Id.*, at 26 (quoting 608 F. Supp., at 217).[2]

The two cases were consolidated on appeal. The United States Court of Appeals for the Sixth Circuit affirmed, one judge dissenting. *Brock* v. *Ely Group, Inc.*, 788 F. 2d 1200

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[2] The District Court for the Eastern District of Tennessee granted petitioner's motion for a stay of the preliminary injunction pending appeal. The stay permitted the delivery and sale of Ely's inventory, on the condition that petitioner place the proceeds in a separate interest-bearing account to be used to pay the wages of Ely's former employees in the event that, on appeal, § 15(a)(1) was held to apply to petitioner. The District Court in the Western District denied a similar motion for a stay, but the Court of Appeals granted a stay on the same conditions. The Court of Appeals subsequently modified its order to permit petitioner to withdraw all but $1.5 million from the account.

(1986). Following the plain language of § 15(a)(1), the majority concluded that "any person" as used in that section applies to secured creditors. *Id.*, at 1202–1203. Like the District Courts, it found this result consistent with the purpose of the FLSA: to exclude tainted goods from interstate commerce. *Id.*, at 1203. The Court of Appeals rejected the reasoning of the Second Circuit in *Wirtz* v. *Powell Knitting Mills Co.*, 360 F. 2d 730 (1966), which had held § 15(a)(1) inapplicable to secured creditors who take possession of goods produced in violation of the FLSA. 788 F. 2d, at 1204–1205. The Sixth Circuit noted that Congress created only two exceptions to the broad scope of § 15(a)(1), one for common carriers and one for good faith purchasers, *id.*, at 1205, and concluded that "*Powell Knitting Mills* created an exception for secured creditors that Congress did not and has not deemed appropriate." *Id.*, at 1206. The dissenting judge would have followed *Powell Knitting Mills*. He maintained that in enacting the "hot goods" provision, Congress was concerned with violations of the Act occurring in the course of the ongoing production of goods by a solvent manufacturer, not, as here, by an insolvent corporation that has ceased operations. *Id.*, at 1207.

We granted certiorari to resolve this conflict among the Circuits.[3] 479 U. S. 929 (1986). We now affirm.

II

A

The FLSA mandates the payment of minimum wage and overtime compensation to covered employees. Section 6(a) provides that every employer, as defined in the Act, "shall pay to each of his employees" wages not less than the specified minimum rate; § 7(a)(1) prohibits employment of any employee in excess of 40 hours per week "unless such employee receives compensation" at a rate of not less than one and one-half times the employee's regular rate. Petitioner does not contest the lower courts' findings that Ely failed to pay its employees *at all* for several weeks immediately preceding the plant closings. Consequently, we conclude, as did the Court of Appeals, that the goods produced during this period were manufactured in violation of § 6 and/or § 7 of the FLSA and are "hot goods" for the purposes of § 15(a)(1).[3] See 788 F. 2d, at 1201.

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[3] In *Shultz* v. *Factors, Inc.*, 65 CCH LC ¶ 32,487 (1971), the Fourth Circuit adopted the reasoning of the Second Circuit in *Wirtz* v. *Powell Knitting Mills Co.*, 360 F. 2d 730 (1966), but added the requirement "that there be no collusion between the manufacturer and his financier permitting the introduction into the market of goods produced in violation of the Act." See also *Dunlop* v. *Sportsmaster, Inc.*, 77 CCH LC ¶ 33,293 (ED Tenn. 1975) (following *Powell Knitting Mills*).

Section 15(a)(1) prohibits "any person" from introducing goods produced in violation of § 6 or § 7 of the FLSA into interstate commerce. Section 3(a) defines "person" as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U. S. C. § 203(a). As a corporate entity, petitioner clearly falls within the plain language of the statute. Section 15(a)(1) contains two exemptions to the general prohibition on interstate shipment of "hot goods." The first, enacted as part of the original FLSA, exempts common carriers from the prohibition on transportation of such goods. The second, added in 1949, exempts a purchaser who acquired the goods for value, without notice of any violation, and "in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements" of the Act.

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[3] Petitioner appears to suggest that Ely's failure to pay its employees did not violate the minimum wage and overtime provisions of the FLSA because §§ 6 and 7 "address wage rates, rather than the problem of nonpayment due to insolvency." Brief for Petitioner 16. This ignores the plain language of the Act, which is not limited to ongoing concerns and makes no exception for employers who are financially or otherwise unable to comply with §§ 6 and 7. The proposition that an employer complies with the FLSA so long as its promised wage rates equal or exceed the statutory minimum, regardless of whether employees actually receive any compensation, would render illusory the Act's protections. As this case demonstrates, such a rule would also encourage financially unstable employers to obtain labor when their financial condition indicates that they are unlikely to be able to pay for it.

Petitioner does not claim to come within either statutory exemption. Rather, it argues that the exemptions reflect congressional intent to limit application of the "hot goods" provision to culpable parties, and therefore, "innocent" secured creditors should not be subject to the Act.[5] We disagree. Although §§6 and 7 only require "employers" to pay minimum wage and overtime, §15(a)(1) refers to "any person," not "any employer." Congress limited *other* provisions of the FLSA as petitioner suggests,[6] which indicates that its failure to do so in §15(a)(1) was not inadvertent. That Congress identified only two narrow categories of "innocent" persons who were not subject to the "hot goods" provision suggests that all other persons, innocent or not, *are* subject to §15(a)(1).[7] We find no indication that Congress actually considered application of the "hot goods" provision to secured creditors when it enacted the FLSA. By claiming a general exemption for creditors, without any duty to ascertain compliance with the FLSA, petitioner is asking us to put creditors in a better position than good-faith purchasers, for whom Congress specifically added an exemption.

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[5] Although it found no evidence of collusion between petitioner and Ely, the United States District Court for the Western District of Tennessee found that petitioner knew that it was funding Ely's payroll and that when its funding ceased, Ely would be unable to meet its payroll obligations. *Ford* v. *Ely Group, Inc.*, 621 F. Supp. 22, 23 (1985).

[6] For example, §12(a)'s prohibitions against child labor are enforceable only against "a producer, manufacturer or dealer," 29 U. S. C. §212(a). See §15(a)(4), 29 U. S. C. §215(a)(4). Under §16(b), backpay may be sought only from an "employer." 29 U. S. C. §216(b). And §16(a) imposes criminal liability only for willful violations of the Act. 29 U. S. C. §216(a).

[7] Congress' motive for exempting common carriers does not appear to have been concern for nonculpable parties, as petitioner suggests, but a desire

"to prevent a case involving the constitutionality of the act from arising in a suit between a shipper and a common carrier, to which the Government was not a party, inasmuch as the common carrier has no interest in the issue of constitutionality, but only in its obligation to accept goods for transportation." H. R. Rep. No. 2182, 75th Cong., 3d Sess., 14 (1938).

In the past, the Court has refused "[t]o extend an exemption to other than those plainly and unmistakably within [the FLSA's] terms and spirit." *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 493 (1945). Similarly, where the FLSA provides exemptions "in detail and with particularity," we have found this to preclude "enlargement by implication." *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617 (1944). See also *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 512 (1950); *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 183–184 (1946). We see no reason to deviate from our traditional approach in this case.

B

Petitioner urges us to look beyond the plain language of the statute, citing the often-quoted passage from *Holy Trinity*

Nor does the 1949 amendment to the Act provide support for petitioner's claim that the "hot goods" provision was never intended to apply to "innocent" secured creditors. To the contrary, the House Report reflects Congress' understanding that the 1938 law did not exempt innocent purchasers from the "hot goods" provision. "[A] purchaser who ships in commerce goods produced by another person who violated the wage-and-hour provisions of the act in the production of such goods, commits an unlawful act." H. R. Rep. No. 267, 81st Cong., 1st Sess., 39 (1949). Had Congress intended the 1938 Act to exempt innocent parties generally, amendment would have been unnecessary.

The amendment changed existing law only to the extent it made it "lawful for a purchaser in good faith of goods produced in violation of the act to sell such goods in commerce," H. R. Conf. Rep. No. 1453, 81st Cong., 1st Sess., 31 (1949), provided he or she obtained assurances "that the goods in question were produced in compliance with the act." *Ibid.* Thus, for the first time, Congress gave purchasers a mechanism for protecting themselves from unwitting violations of the Act, for which they would otherwise have been liable. See H. R. Rep. No. 267, *supra*, at 39.

Church v. *United States*, 143 U. S. 457, 459 (1892): "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." According to petitioner, the sole aim of the FLSA was to establish decent wages and hours for American workers. This goal, petitioner claims, is not furthered by application of § 15(a)(1) to creditors who acquire "hot goods" by foreclosure and are not themselves responsible for the minimum wage and overtime violations. However, we conclude that the legislative intent fully supports the result achieved by application of the plain language.

While improving working conditions was undoubtedly *one* of Congress' concerns, it was certainly not the *only* aim of the FLSA. In addition to the goal identified by petitioner, the Act's declaration of policy, contained in § 2(a), reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions.[illegible] 29

[illegible] Section 2(a), codified at 29 U. S. C. § 202(a), provides:

"The Congress finds that the existence, in industries engaged in commerce . . . , of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) *constitutes an unfair method of competition in commerce;* (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) *interferes with the orderly and fair marketing of goods in commerce*" (emphasis added).

President Roosevelt's message to Congress, which served as the inspiration for passage of the Act, makes a similar point: "Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade." H. R. Doc. No. 255, 75th Cong., 1st Sess., 3 (1937). See *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 516 (1950). The President's message was cited approvingly throughout the legislative history of the 1938 Act. See, *e. g.*, S. Rep. No. 884, 75th Cong., 1st Sess., 1–3 (1937); H. R. Rep. No. 1452, 75th Cong., 1st Sess., 5–7 (1937); H. R. Rep. No. 2182, *supra*, at 5.

U. S. C. § 202(a). This Court has consistently recognized this broad regulatory purpose. "The motive and purpose of the present regulation are plainly . . . that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce." *United States* v. *Darby*, 312 U. S. 100, 115 (1941). See also *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 296 (1985); *Maryland* v. *Wirtz*, 392 U. S. 183, 189 (1968); *Rutherford Food Corp* v. *McComb*, 331 U. S. 722, 727 (1947).

Application of § 15(a)(1) to secured creditors furthers this goal by excluding tainted goods from interstate commerce. Had the Department of Labor not obtained an injunction in this case, petitioner, as a secured creditor, would have converted several weeks of labor by the debtor's employees into goods covered by its security interest; the "hot goods" produced by these uncompensated employees would have competed with goods produced in conformity with the FLSA's minimum wage and overtime requirements. Moreover, prohibiting foreclosing creditors from selling "hot goods" also advances the goal identified by petitioner. Secured creditors often monitor closely the operations of employer-borrowers, as petitioner did in this case. They may be in a position to insist on compliance with the FLSA's minimum wage and overtime requirements. As the District Court for the Western District observed:

Despite these expansive indications of legislative purpose, petitioner insists that Congress was concerned about competition only to the extent that competition from "'chiselers'" had the effect of driving down wages and working conditions. Brief for Petitioner 24–25. However, based on the statute, its legislative history, and our prior decisions, we conclude that exclusion from interstate commerce of goods produced under substandard conditions is not simply a means to enforce other statutory goals; it is itself a central purpose of the FLSA.

> "[I]f foreclosing creditors are free to ship and sell tainted goods across state lines, the temptation to overextend credit to marginal producers is strong, as is the likelihood that such producers will become unable to meet their payrolls. The reason for this is that finance companies and institutions stand to reap financial gain by keeping such producers in business. A holding by this Court that creditors may not ship and sell in interstate commerce goods produced in violation of the Act will not only protect complying manufacturers from the unfair competition of such tainted goods, but, we submit, *it will also discourage the type of commercial financing which leads to minimum wage and overtime violations.*" 621 F. Supp., at 26 (emphasis added).

C

A literal application of § 15(a)(1) does not grant employees a priority in "hot goods" superior to that which a secured creditor has under state law. Petitioner's rights in the collateral as against Ely are unchanged by our holding. Petitioner still owns the goods, subject only to the "hot goods" provision, which prevents it from placing them in interstate commerce. The employees have not acquired a possessory interest in the goods.[9] Indeed, as the District Court for the Western District of Tennessee recognized, the Secretary brought this action "not to compel the foreclosing creditor to pay the statutory wages or to put pressure on the defaulting producer to pay such wages, but to keep tainted goods from entering the channels of interstate commerce." *Id.*, at 25–26. That petitioner can cure the employer's violation of the FLSA by paying the employees the statutorily required wages does not give the employees a "lien" on the assets superior to that of a secured creditor.[10]

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[9] Of course, under state law, the employees may have a lien on the employer's property superior to petitioner's lien. See Tenn. Code Ann. § 66–13–101 (1982) (creating statutory wage lien on "corporate or firm property of every character and description"). However, any such lien would exist independent of the application of the FLSA to petitioner.

In numerous other statutes, Congress has exercised its authority under the Commerce Clause to exclude from interstate commerce goods which, for a variety of reasons, it considers harmful. Like the FLSA, these regulatory measures bar goods not produced in conformity with specified standards from the channels of commerce.[11] As the District Courts in this case recognized, secured creditors take their security interests subject to the laws of the land. See 621 F. Supp., at 26; 608 F. Supp., at 217. If, for example, the goods at issue in this case were fabrics that failed to meet federal flammability standards and were therefore banned from interstate commerce under the Flammable Fabrics Act, 67 Stat. 111, as amended, 15 U. S. C. § 1191 *et seq.*, surely petitioner could not argue that it had a right to sell the inventory merely by virtue of its status as a secured creditor. "Hot goods" are not inherently hazardous, but Congress has determined that they are contraband nonetheless. We see no reason for a different result merely because a different form of contraband is involved.

III

We hold that § 15(a)(1)'s broad prohibition on interstate shipment of "hot goods" applies to secured creditors who acquire the goods pursuant to a security agreement. This result is mandated by the plain language of the statute, and it furthers the goal of eliminating the competitive advantage enjoyed by goods produced under substandard labor conditions. Accordingly, the judgment of the Court of Appeals is

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[10] Petitioner also argues that application of the "hot goods" prohibition to secured creditors will interfere with the operation of the Bankruptcy Code. Because Ely has not filed for bankruptcy, however, this issue is not before us.

[11] See, *e. g.*, 15 U. S. C. § 1192 (fabrics failing to conform to flammability standards); 15 U. S. C. § 1211 (household refrigerators without prescribed safety devices); 15 U. S. C. §§ 1263(a)–(c), (f) (misbranded or banned hazardous substances); 21 U. S. C. §§ 331(a)–(d) (adulterated or misbranded food, drugs, and cosmetics); 21 U. S. C. §§ 458(a)(2)–(4) (adulterated, misbranded, or uninspected poultry products).

Affirmed.

JUSTICE SCALIA, concurring.

While I would affirm the Court of Appeals even if I agreed with petitioner that "the sole aim of the FLSA was to establish decent wages and hours for American workers," *ante*, at 36, and that this goal "is not furthered by application of § 15(a)(1)" to secured creditors, *ibid.*, I do not disagree with the Court's conclusions in Part II–B, and therefore join its opinion in full.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

The statute that the Court construes today was enacted during the Great Depression. Although business failures were an everyday occurrence in 1938, nothing in the language or history of the Fair Labor Standards Act (FLSA or Act) suggests that Congress intended that Act to address the unfortunate situation that arises when an employer is unable to pay his employees for the final days of work that produced the inventory at hand when the plant was forced to close.

Indeed, if there is one conclusion that both parties before us, and every court that has ever considered this matter, agree upon, it is that Congress did not "actually conside[r] application of the 'hot goods' provision to secured creditors when it enacted the FLSA." *Ante*, at 34–35. This historical fact carries much weight in this case. The subjects of bankruptcy and secured transactions constitute discrete bodies of law, which are generally governed by the Federal Bankruptcy Code and by state law, respectively.[1] Instead of interpreting Congress' silence as evincing intent to invade these areas with an Act whose purposes do not fit nicely into these contexts,[2] I would interpret Congress' utter silence as showing that Congress never intended to apply the FLSA to these unique areas of the law.[3] See *Kelly* v. *Robinson*, 479 U. S. 36, 47 (1986).

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[1] The FLSA was enacted to prevent employers from paying substandard wages. Section 15 (a)(1) is designed to prevent employers from producing goods at such low cost that they could undersell competitors who paid what Congress deemed to be a decent wage. The concern of the statute was the

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ongoing business with its continuing impact on both the labor market and the commercial market. It was not remotely concerned with the perennial problem of distress sales that follow in the wake of a business failure. Under the Court's novel reading of the Act, any such sale—whether by a secured creditor, a trustee in bankruptcy, or even by a creditor's committee trying to raise funds to meet a shortage in the final payroll—would be a sale of "hot goods" and therefore illegal.

[2] As Judge Engel explained in dissent from the Court of Appeals' decision:

"The practical effect of the majority's decision is not to remove any tainted goods from competition for, as happened here, almost always the result will be that the goods are sold, if not in foreclosure, then in bankruptcy, or by other attaching creditors. As here, the goods will go out in the market, but whether they are sold for competitively destructive prices will not depend on the cost of their production but upon the manner of their sale in any event. The real effect of the majority's interpretation is simply to create a judicial lien superior to the otherwise lawful lien which Citicorp possessed in the goods. In my view, this kind of pressure is the only motivation in the government in its present construction of the Act. Had it intended to create a federal lien law, Congress no doubt could have done so, but it did not. State laws governing creditors' rights, state laws protecting employees from non-payment of wages and bankruptcy laws generally, provide a great deal of relief for the protection of employees of defunct and insolvent corporations. It seems to me that in this special area of concern, the operation of these more traditional sources of law was intended by Congress to be sufficient. It is my opinion, therefore, that under a common sense application of section 15(a)(1), Congress was looking instead at application of the Act in the course of the ongoing production of goods and not at the situation obtaining here and in the like cases in the Second and Fourth Circuits." *Brock* v. *Ely Group, Inc.*, 788 F. 2d 1200, 1207 (1986).

[3] Aside from my conclusion that secured creditors such as Citicorp are not barred from selling "hot goods," I also have doubts about whether the employees who participated in the production of the goods at issue in this case were "employed in violation of [the FLSA]" within the meaning of

Even were I not confident in that conclusion, however, I certainly believe that the arguments in favor of petitioner's construction are substantial enough to warrant our adherence to settled precedent. During the 28 years from the enactment of the FLSA through 1966 it appears that no Secretary of Labor ever sought an injunction against the sale of "hot goods" in circumstances such as these. See *Wirtz* v. *Powell Knitting Mills Co.*, 360 F. 2d 730, 733 (CA2 1966). When a Secretary did attempt to use the statute in this novel way, the Court of Appeals for the Second Circuit summarily rejected his interpretation, explaining:

> "We believe that there was no Congressional intent that concerns in [the creditor's] position be within § 15. The purpose of forcing payment of wages should not apply to the creditor who advanced funds long before the default in wages, and who merely forecloses his lien, at least where the value of the goods acquired does not exceed the debt left unpaid. Since [the creditor] is not giving present consideration, it can neither force [the employer] to make payment nor withhold wages from its payment and pay the wage earners itself. It already provided [the employer] with cash, part of which no doubt went for wages that were paid. Since the only reason to give effect to § 15 would be to force [the creditor] to pay the wages, § 15 ought not apply to it, in a backhanded way of attacking its secured position.
>
> "The Secretary stresses the point that when the Congress desired to protect bona fide purchasers from the strict wording of the Act it found it easy to do so by

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§ 15(a)(1) of the Act at the time the goods were produced. See *ante*, at 30, n. 1. The terms of their employment complied with the statute and when they performed their services everyone expected and intended that they would be paid in full. It may well be true that the *employer* committed a violation of the Act when it was subsequently unable to meet its payroll, but I am not sure the inventory can be branded "hot goods" because of that subsequent event.

> amending the Act with appropriate safeguards. This would indeed be persuasive if there were indications that the present problem of the foreclosing secured creditor had been brought to the attention of the Congress. The argument loses force because this was apparently never done, and the Secretary's present contention is much weakened by the fact that since the enactment of the Act in 1938 neither he nor his predecessors appear to have so read the Act, in spite of the myriad of instances in which similar security titles must have been enforced." *Id.*, at 733.

I would have subscribed to this reasoning in 1966, and certainly do now. In the more than 20 years since the Second Circuit's decision, its construction of the statute has not been called into question by the courts that have addressed the issue, except in the decisions now on review. See *Shultz* v. *Factors, Inc.*, 65 CCH LC ¶32,487 (CA4 1971); *Dunlop* v. *Sportsmasters, Inc.*, 77 CCH LC ¶33,293 (ED Tenn. 1975). Given the Secretary's practice prior to the *Powell Knitting* decision, the judicial acceptance of that decision, and the fact that Congress has not seen fit to amend the statute in light of these decisions,[4] I believe that the *Powell Knitting* construction should be retained until Congress rejects it. See *Commissioner* v. *Fink*, *post*, at 102–103 (STEVENS, J., dissenting); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 268 (1987) (STEVENS, J., dissenting).

I respectfully dissent.

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[4] The FLSA has been amended on at least four occasions since the *Powell Knitting* decision. See, *e. g.*, Pub. L. 99–150, 99 Stat. 787 (1985); Pub. L. 95–151, 91 Stat. 1245 (1977); Pub. L. 93–259, 88 Stat. 55 (1974); Pub. L. 89–601, 80 Stat. 830 (1966).

ROCK *v.* ARKANSAS

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 86-130. Argued March 23, 1987—Decided June 22, 1987

Petitioner was charged with manslaughter for shooting her husband. In order to refresh her memory as to the precise details of the shooting, she twice underwent hypnosis by a trained neuropsychologist. These sessions were tape-recorded. After the hypnosis, she remembered details indicating that her gun was defective and had misfired, which was corroborated by an expert witness' testimony. However, the trial court ruled that no hypnotically refreshed testimony would be admitted, and limited petitioner's testimony to a reiteration of her statements to the doctor prior to hypnosis, as reported in the doctor's notes. The Arkansas Supreme Court affirmed her conviction, ruling that the limitations on her testimony did not violate her constitutional right to testify, and that criminal defendants' hypnotically refreshed testimony is inadmissible *per se* because it is unreliable.

Held:

1. Criminal defendants have a right to testify in their own behalf under the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. Pp. 49–53.

2. Although the right to present relevant testimony is not without limitation, restrictions placed on a defendant's constitutional right to testify by a State's evidentiary rules may not be arbitrary or disproportionate to the purposes they are designed to serve. Pp. 53–56.

3. Arkansas' *per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his or her own behalf. Despite any unreliability that hypnosis may introduce into testimony, the procedure has been credited as instrumental in obtaining particular types of information. Moreover, hypnotically refreshed testimony is subject to verification by corroborating evidence and other traditional means of assessing accuracy, and inaccuracies can be reduced by procedural safeguards such as the use of tape or video recording. The State's legitimate interest in barring unreliable evidence does not justify a *per se* exclusion because the evidence may be reliable in an individual case. Here, the expert's corroboration of petitioner's hypnotically enhanced memories and the trial judge's conclusion that the tape recordings indicated that the doctor did not suggest responses with

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leading questions are circumstances that the trial court should have considered in determining admissibility. Pp. 56–62.

288 Ark. 566, 708 S. W. 2d 78, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE, O'CONNOR, and SCALIA, JJ., joined, *post*, p. 62.

James M. Luffman argued the cause and filed briefs for petitioner.

J. Steven Clark, Attorney General of Arkansas, argued the cause for respondent. With him on the brief was *Clint Miller*, Assistant Attorney General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue presented in this case is whether Arkansas' evidentiary rule prohibiting the admission of hypnotically refreshed testimony violated petitioner's constitutional right to testify on her own behalf as a defendant in a criminal case.

I

Petitioner Vickie Lorene Rock was charged with manslaughter in the death of her husband, Frank Rock, on July 2, 1983. A dispute had been simmering about Frank's wish to move from the couple's small apartment adjacent to Vickie's beauty parlor to a trailer she owned outside town. That night a fight erupted when Frank refused to let petitioner eat some pizza and prevented her from leaving the apartment to get something else to eat. App. 98, 103–104. When police arrived on the scene they found Frank on the floor with a bullet wound in his chest. Petitioner urged the officers to help

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**John K. Van de Kamp*, Attorney General, *Steve White*, Chief Assistant Attorney General, *Arnold O. Overoye*, Assistant Attorney General, and *Shirley A. Nelson* and *Garrett Beaumont*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

David M. Heilbron and *Christopher Berka* filed a brief for the Product Liability Advisory Council et al. as *amici curiae*.

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her husband, Tr. 230, and cried to a sergeant who took her in charge, "please save him" and "don't let him die." *Id.*, at 268. The police removed her from the building because she was upset and because she interfered with their investigation by her repeated attempts to use the telephone to call her husband's parents. *Id.*, at 263–264, 267–268. According to the testimony of one of the investigating officers, petitioner told him that "she stood up to leave the room and [her husband] grabbed her by the throat and choked her and threw her against the wall and . . . at that time she walked over and picked up the weapon and pointed it toward the floor and he hit her again and she shot him." *Id.*, at 281.[1]

Because petitioner could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. Petitioner was hypnotized twice by Doctor Bettye Back, a licensed neuropsychologist with training in the field of hypnosis. *Id.*, at 901–903. Doctor Back interviewed petitioner for an hour prior to the first hypnosis session, taking notes on petitioner's general history and her recollections of the shooting. App. 46–47.[2] Both hypnosis sessions were recorded on

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[1] Another officer reported a slightly different version of the events:

"She stated that she had told her husband that she was going to go outside. He refused to let her leave and grabbed her by the throat and began choking her. They struggled for a moment and she grabbed a gun. She told him to leave her alone and he hit her at which time the gun went off. She stated that it was an accident and she didn't mean to shoot him. She said she had to get to the hospital and talk to him." Tr. 388.

See also *id.*, at 301–304, 337–338; App. 3–10.

[2] Doctor Back's handwritten notes regarding petitioner's memory of the day of the shooting read as follows:

"Pt states she & husb. were discussing moving out to a trailer she had prev. owned. He was 'set on' moving out to the trailer—she felt they should discuss. She bec[ame] upset & went to another room to lay down. Bro. came & left. She came out to eat some of the pizza, he wouldn't allow her to have any. She said she would go out and get [something] to eat he wouldn't allow her—He pushed her against a wall an end table in the cortape. *Id.*, at 53. Petitioner did not relate any new information during either of the sessions, *id.*, at 78, 83, but, after the hypnosis, she was able to remember that at the time of the incident she had her thumb on the hammer of the gun, but had not held her finger on the trigger. She also recalled that the gun had discharged when her husband grabbed her arm during the scuffle. *Id.*, at 29, 38. As a result of the details that petitioner was able to remember about the shooting, her counsel arranged for a gun expert to examine the handgun, a single-action Hawes .22 Deputy Marshal. That inspection revealed that the gun was defective and prone to fire, when hit or dropped, without the trigger's being pulled. Tr. 662–663, 711.

When the prosecutor learned of the hypnosis sessions, he filed a motion to exclude petitioner's testimony. The trial judge held a pretrial hearing on the motion and concluded that no hypnotically refreshed testimony would be admitted. The court issued an order limiting petitioner's testimony to "matters remembered and stated to the examiner prior to being placed under hypnosis." App. to Pet. for Cert. xvii.[3]

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ner [with] a gun on it. They were the night watchmen for business that sets behind them. She picked gun up stated she didn't want him hitting her anymore. He wouldn't let her out door, slammed door & 'gun went off & he fell & he died' [pt looked misty eyed here—near tears]" (additions by Doctor Back). App. 40.

[3] The full pretrial order reads as follows:

"NOW on this 26th day of November, 1984, comes on the captioned matter for pre-trial hearing, and the Court finds:

"1. On September 27 and 28, 1984, Defendant was placed under hypnotic trance by Dr. Bettye Back, PhD, Fayetteville, Arkansas, for the express purpose of enhancing her memory of the events of July 2, 1983, involving the death of Frank Rock.

"2. Dr. Back was professionally qualified to administer hypnosis. She was objective in the application of the technique and did not suggest by leading questions the responses expected to be made by Defendant. She was employed on an independent, professional basis. She made written notes of facts related to her by Defendant during the pre-hypnotic interview. She did employ post-hypnotic suggestion with Defendant. No one

At trial, petitioner introduced testimony by the gun expert, Tr. 647–712, but the court limited petitioner's own description of the events on the day of the shooting to a reiteration of the sketchy information in Doctor Back's notes. See App. 96–104.[4] The jury convicted petitioner on the manslaughter charge and she was sentenced to 10 years' imprisonment and a $10,000 fine.

On appeal, the Supreme Court of Arkansas rejected petitioner's claim that the limitations on her testimony violated her right to present her defense. The court concluded that "the dangers of admitting this kind of testimony outweigh whatever probative value it may have," and decided to follow

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else was present during any phase of the hypnosis sessions except Dr. Back and Defendant.

"3. Defendant cannot be prevented by the Court from testifying at her trial on criminal charges under the Arkansas Constitution, but testimony of matters recalled by Defendant due to hypnosis will be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters. Defendant may testify to matters remembered and stated to the examiner prior to being placed under hypnosis. Testimony resulting from post-hypnotic suggestion will be excluded." App. to Pet. for Cert. xvii.

[4] When petitioner began to testify, she was repeatedly interrupted by the prosecutor, who objected that her statements fell outside the scope of the pretrial order. Each time she attempted to describe an event on the day of the shooting, she was unable to proceed for more than a few words before her testimony was ruled inadmissible. For example, she was unable to testify without objection about her husband's activities on the morning of the shooting, App. 11, about their discussion and disagreement concerning the move to her trailer, *id.*, at 12, 14, about her husband's and his brother's replacing the shock absorbers on a van, *id.*, at 16, and about her brother-in-law's return to eat pizza, *id.*, at 19–20. She then made a proffer, outside the hearing of the jury, of testimony about the fight in an attempt to show that she could adhere to the court's order. The prosecution objected to every detail not expressly described in Doctor Back's notes or in the testimony the doctor gave at the pretrial hearing. *Id.*, at 32–35. The court agreed with the prosecutor's statement that "ninety-nine percent of everything [petitioner] testified to in the proffer" was inadmissible. *Id.*, at 35.

the approach of States that have held hypnotically refreshed testimony of witnesses inadmissible *per se*. 288 Ark. 566, 573, 708 S. W. 2d 78, 81 (1986). Although the court acknowledged that "a defendant's right to testify is fundamental," *id.*, at 578, 708 S. W. 2d, at 84, it ruled that the exclusion of petitioner's testimony did not violate her constitutional rights. Any "prejudice or deprivation" she suffered "was minimal and resulted from her own actions and not by any erroneous ruling of the court." *Id.*, at 580, 708 S. W. 2d, at 86. We granted certiorari, 479 U. S. 947 (1986), to consider the constitutionality of Arkansas' *per se* rule excluding a criminal defendant's hypnotically refreshed testimony.

II

Petitioner's claim that her testimony was impermissibly excluded is bottomed on her constitutional right to testify in her own defense. At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense. This, of course, is a change from the historic common-law view, which was that all parties to litigation, including criminal defendants, were disqualified from testifying because of their interest in the outcome of the trial. See generally 2 J. Wigmore, Evidence §§ 576, 579 (J. Chadbourn rev. 1979). The principal rationale for this rule was the possible untrustworthiness of a party's testimony. Under the common law, the practice did develop of permitting criminal defendants to tell their side of the story, but they were limited to making an unsworn statement that could not be elicited through direct examination by counsel and was not subject to cross-examination. *Id.*, at § 579, p. 827.

This Court in *Ferguson* v. *Georgia*, 365 U. S. 570, 573–582 (1961), detailed the history of the transition from a rule of a defendant's incompetency to a rule of competency. As the

Court there recounted, it came to be recognized that permitting a defendant to testify advances both the "'detection of guilt'" and "'the protection of innocence,'" *id.*, at 581, quoting 1 Am. L. Rev. 396 (1867), and by the end of the second half of the 19th century,[5] all States except Georgia had enacted statutes that declared criminal defendants competent to testify. See 365 U. S., at 577 and n. 6, 596–598.[6] Congress enacted a general competency statute in the Act of Mar. 16, 1878, 20 Stat. 30, as amended, 18 U. S. C. § 3481, and similar developments followed in other common-law countries. Thus, more than 25 years ago this Court was able to state:

> "In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case." *Ferguson* v. *Georgia*, 365 U. S., at 582.[7]

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[5] The removal of the disqualifications for accused persons occurred later than the establishment of the competence to testify of civil parties. 2 J. Wigmore, Evidence § 579, p. 826 (J. Chadbourn rev. 1979). This was not due to concern that criminal defendants were more likely to be unreliable than other witnesses, but to a concern for the accused:

"If, being competent, he failed to testify, that (it was believed) would damage his cause more seriously than if he were able to claim that his silence were enforced by law. Moreover, if he did testify, that (it was believed) would injure more than assist his cause, since by undergoing the ordeal of cross-examination, he would appear at a disadvantage dangerous even to an innocent man." *Id.*, at 828.

[6] The Arkansas Constitution guarantees an accused the right "to be heard by himself and his counsel." Art. 2, § 10. Rule 601 of the Arkansas Rules of Evidence provides a general rule of competency: "Every person is competent to be a witness except as otherwise provided in these rules."

[7] *Ferguson* v. *Georgia* struck down as unconstitutional under the Fourteenth Amendment a Georgia statute that limited a defendant's presentation at trial to an unsworn statement, insofar as it denied the accused "the right to have his counsel question him to elicit his statement." 365 U. S., at 596. The Court declined to reach the question of a defendant's

The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process." *Faretta* v. *California*, 422 U. S. 806, 819, n. 15 (1975). The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony:

> "A person's right to reasonable notice of a charge against him, and *an opportunity to be heard in his defense*—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (Emphasis added.) *In re Oliver*, 333 U. S. 257, 273 (1948).[8]

See also *Ferguson* v. *Georgia*, 365 U. S., at 602 (Clark, J., concurring) (Fourteenth Amendment secures "right of a criminal defendant to choose between silence and testifying in his own behalf").[9]

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constitutional right to testify, because the case did not involve a challenge to the particular Georgia statute that rendered a defendant incompetent to testify. *Id.*, at 572, n. 1. Two Justices, however, urged that such a right be recognized explicitly. *Id.*, at 600–601, 602 (concurring opinions).

[8] Before *Ferguson* v. *Georgia*, it might have been argued that a defendant's ability to present an unsworn statement would satisfy this right. Once that procedure was eliminated, however, there was no longer any doubt that the right to be heard, which is so essential to due process in an adversary system of adjudication, could be vindicated only by affording a defendant an opportunity to testify before the factfinder.

[9] This right reaches beyond the criminal trial: the procedural due process constitutionally required in some extrajudicial proceedings includes the right of the affected person to testify. See, *e. g.*, *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782, 786 (1973) (probation revocation); *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972) (parole revocation); *Goldberg* v. *Kelly*, 397 U. S. 254, 269 (1970) (termination of welfare benefits).

The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington* v. *Texas*, 388 U. S. 14, 17–19 (1967). Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 867 (1982), is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony. Like the truthfulness of other witnesses, the defendant's veracity, which was the concern behind the original common-law rule, can be tested adequately by cross-examination. See generally Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 119–120 (1974).

Moreover, in *Faretta* v. *California*, 422 U. S., at 819, the Court recognized that the Sixth Amendment

> "grants to the accused *personally* the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" (Emphasis added.)

Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," *ibid.*, is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.

The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In *Harris* v. *New York*, 401 U. S. 222, 230 (1971), the Court stated: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.*, at 225. Three of the dissenting Justices in that case agreed that the Fifth Amendment encompasses this right: "[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' . . . The choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege." *Id.*, at 230, quoting *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964). (Emphasis removed.)[10]

III

The question now before the Court is whether a criminal defendant's right to testify may be restricted by a state rule that excludes her posthypnosis testimony. This is not the first time this Court has faced a constitutional challenge to a state rule, designed to ensure trustworthy evidence, that interfered with the ability of a defendant to offer testimony. In *Washington* v. *Texas*, 388 U. S. 14 (1967), the Court was confronted with a state statute that prevented persons charged as principals, accomplices, or accessories in the same crime from being introduced as witnesses for one another. The statute, like the original common-law prohibition on testimony by the accused, was grounded in a concern for the reliability of evidence presented by an interested party:

> "It was thought that if two persons charged with the same crime were allowed to testify on behalf of each

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[10] On numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right. See, *e. g.*, *Nix* v. *Whiteside*, 475 U. S. 157, 164 (1986); *id.*, at 186, n. 5 (BLACKMUN, J., concurring in judgment); *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983) (defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf"); *Brooks* v. *Tennessee*, 406 U. S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

> other, 'each would try to swear the other out of the charge.' This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." (Footnote omitted.) *Id.*, at 21, quoting *Benson* v. *United States*, 146 U. S. 325, 335 (1892).

As the Court recognized, the incompetency of a codefendant to testify had been rejected on nonconstitutional grounds in 1918, when the Court, refusing to be bound by "the dead hand of the common-law rule of 1789," stated:

> "'[T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . .'" 388 U. S., at 22, quoting *Rosen* v. *United States*, 245 U. S. 467, 471 (1918).

The Court concluded that this reasoning was compelled by the Sixth Amendment's protections for the accused. In particular, the Court reasoned that the Sixth Amendment was designed in part "to make the testimony of a defendant's witnesses admissible on his behalf in court." 388 U. S., at 22.

With the rationale for the common-law incompetency rule thus rejected on constitutional grounds, the Court found that the mere presence of the witness in the courtroom was not enough to satisfy the Constitution's Compulsory Process Clause. By preventing the defendant from having the benefit of his accomplice's testimony, "the State *arbitrarily* denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." (Emphasis added.) *Id.*, at 23.

Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), the Court invalidated a State's hearsay rule on the ground that it abridged the defendant's right to "present witnesses in his own defense." *Id.*, at 302. Chambers was tried for a murder to which another person repeatedly had confessed in the presence of acquaintances. The State's hearsay rule, coupled with a "voucher" rule that did not allow the defendant to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony concerning these confessions, which were critical to his defense. This Court reversed the judgment of conviction, holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process. *Ibid.* In the Court's view, the State in *Chambers* did not demonstrate that the hearsay testimony in that case, which bore "assurances of trustworthiness" including corroboration by other evidence, would be unreliable, and thus the defendant should have been able to introduce the exculpatory testimony. *Ibid.*

Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.*, at 295.[11] But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

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[11] Numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify. See, *e. g.*, *Chambers* v. *Mississippi*, 410 U. S., at 302 ("In the exercise of this

IV

The Arkansas rule enunciated by the state courts does not allow a trial court to consider whether posthypnosis testimony may be admissible in a particular case; it is a *per se* rule prohibiting the admission at trial of any defendant's hypnotically refreshed testimony on the ground that such testimony is always unreliable.[12] Thus, in Arkansas, an accused's testimony is limited to matters that he or she can prove were remembered *before* hypnosis. This rule operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced.[13]

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right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence"); *Washington* v. *Texas*, 388 U. S. 14, 23, n. 21 (1967) (opinion should not be construed as disapproving testimonial privileges or nonarbitrary rules that disqualify those incapable of observing events due to mental infirmity or infancy from being witnesses).

[12] The rule leaves a trial judge no discretion to admit this testimony, even if the judge is persuaded of its reliability by testimony at a pretrial hearing. Tr. of Oral Arg. 36 (statement of the Attorney General of Arkansas).

[13] The Arkansas Supreme Court took the position that petitioner was fully responsible for any prejudice that resulted from the restriction on her testimony because it was she who chose to resort to the technique of hypnosis. 288 Ark. 566, 580, 708 S. W. 2d 78, 86 (1986). The prosecution and the trial court each expressed a similar view and the theme was renewed repeatedly at trial as a justification for limiting petitioner's testimony. See App. 15, 20, 21–22, 24, 36. It should be noted, however, that Arkansas had given no previous indication that it looked with disfavor on the use

In this case, the application of that rule had a significant adverse effect on petitioner's ability to testify. It virtually prevented her from describing any of the events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses. Even more importantly, under the court's rule petitioner was not permitted to describe the actual shooting except in the words contained in Doctor Back's notes. The expert's description of the gun's tendency to misfire would have taken on greater significance if the jury had heard petitioner testify that she did not have her finger on the trigger and that the gun went off when her husband hit her arm.

In establishing its *per se* rule, the Arkansas Supreme Court simply followed the approach taken by a number of States that have decided that hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be unreliable.[14] Other States that have adopted an exclusionary rule, however, have done so for the testimony of *witnesses*, not for the testimony of a *defendant*. The Arkansas

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of hypnosis to assist in the preparation for trial and there were no previous state-court rulings on the issue.

[14] See, *e. g.*, *Contreras* v. *State*, 718 P. 2d 129 (Alaska 1986); *State ex rel. Collins* v. *Superior Court, County of Maricopa*, 132 Ariz. 180, 207–208, 644 P. 2d 1266, 1293–1294 (1982); *People* v. *Quintanar*, 659 P. 2d 710, 711 (Colo. App. 1982); *State* v. *Davis*, 490 A. 2d 601 (Del. Super. 1985); *Bundy* v. *State*, 471 So. 2d 9, 18–19 (Fla. 1985), cert. denied, 479 U. S. 894 (1986); *State* v. *Moreno*, 68 Haw. 233, 709 P. 2d 103 (1985); *State* v. *Haislip*, 237 Kan. 461, 482, 701 P. 2d 909, 925–926, cert. denied, 474 U. S. 1022 (1985); *State* v. *Collins*, 296 Md. 670, 464 A. 2d 1028 (1983); *Commonwealth* v. *Kater*, 388 Mass. 519, 447 N. E. 2d 1190 (1983); *People* v. *Gonzales*, 415 Mich. 615, 329 N. W. 2d 743 (1982), opinion added to, 417 Mich. 1129, 336 N. W. 2d 751 (1983); *Alsbach* v. *Bader*, 700 S. W. 2d 823 (Mo. 1985); *State* v. *Palmer*, 210 Neb. 206, 218, 313 N. W. 2d 648, 655 (1981); *People* v. *Hughes*, 59 N. Y. 2d 523, 453 N. E. 2d 484 (1983); *Robison* v. *State*, 677 P. 2d 1080, 1085 (Okla. Crim. App.), cert. denied, 467 U. S. 1246 (1984); *Commonwealth* v. *Nazarovitch*, 496 Pa. 97, 110, 436 A. 2d 170, 177 (1981); *State* v. *Martin*, 101 Wash. 2d 713, 684 P. 2d 651 (1984). See *State* v. *Ture*, 353 N. W. 2d 502, 513–514 (Minn. 1984).

Supreme Court failed to perform the constitutional analysis that is necessary when a defendant's right to testify is at stake.[15]

Although the Arkansas court concluded that any testimony that cannot be proved to be the product of prehypnosis memory is unreliable, many courts have eschewed a *per se* rule and permit the admission of hypnotically refreshed testimony.[16] Hypnosis by trained physicians or psychologists has

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[15] The Arkansas court relied on a California case, *People* v. *Shirley*, 31 Cal. 3d 18, 723 P. 2d 1354, cert. denied, 459 U. S. 860 (1982), for much of its reasoning as to the unreliability of hypnosis. 288 Ark., at 575–578, 708 S. W. 2d, at 83–84. But while the California court adopted a far stricter general rule—barring entirely testimony by any witness who has been hypnotized—it explicitly excepted testimony by an accused:

"[W]hen it is the defendant himself—not merely a defense witness—who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf." 31 Cal. 3d, at 67, 723 P. 2d, at 1384.

This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue.

[16] Some jurisdictions have adopted a rule that hypnosis affects the credibility, but not the admissibility, of testimony. See, *e. g.*, *Beck* v. *Norris*, 801 F. 2d 242, 244–245 (CA6 1986); *United States* v. *Awkard*, 597 F. 2d 667, 669 (CA9), cert. denied, 444 U. S. 885 (1979); *State* v. *Wren*, 425 So. 2d 756 (La. 1983); *State* v. *Brown*, 337 N. W. 2d 138, 151 (N. D. 1983); *State* v. *Glebock*, 616 S. W. 2d 897, 903–904 (Tenn. Crim. App. 1981); *Chapman* v. *State*, 638 P. 2d 1280, 1282 (Wyo. 1982).

Other courts conduct an individualized inquiry in each case. See, *e. g.*, *McQueen* v. *Garrison*, 814 F. 2d 951, 958 (CA4 1987) (reliability evaluation); *Wicker* v. *McCotter*, 783 F. 2d 487, 492–493 (CA5) (probative value of the testimony weighed against its prejudicial effect), cert. denied, 478 U. S. 1010 (1986); *State* v. *Iwakiri*, 106 Idaho 618, 625, 682 P. 2d 571, 578 (1984) (weigh "totality of circumstances").

In some jurisdictions, courts have established procedural prerequisites for admissibility in order to reduce the risks associated with hypnosis. Perhaps the leading case in this line is *State* v. *Hurd*, 86 N. J. 525, 432 A. 2d 86 (1981). See also *Sprynczynatyk* v. *General Motors Corp.*, 771 F. 2d been recognized as a valid therapeutic technique since 1958, although there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. See Council on Scientific Affairs, Scientific Status of Refreshing Recollection by the Use of Hypnosis, 253 J. A. M. A. 1918, 1918–1919 (1985) (Council Report).[17] The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled.

Responses of individuals to hypnosis vary greatly. The popular belief that hypnosis guarantees the accuracy of recall is as yet without established foundation and, in fact, hypnosis often has no effect at all on memory. The most common response to hypnosis, however, appears to be an increase in both correct and incorrect recollections.[18] Three general characteristics of hypnosis may lead to the introduction of inaccurate memories: the subject becomes "suggestible" and may try to please the hypnotist with answers the subject

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1112, 1122–1123 (CA8 1985), cert. denied, 475 U. S. 1046 (1986); *United States* v. *Harrington*, 18 M. J. 797, 803 (A. C. M. R. 1984); *House* v. *State*, 445 So. 2d 815, 826–827 (Miss. 1984); *State* v. *Beachum*, 97 N. M. 682, 689–690, 643 P. 2d 246, 253–254 (App. 1981), writ quashed, 98 N. M. 51, 644 P. 2d 1040 (1982); *State* v. *Weston*, 16 Ohio App. 3d 279, 287, 475 N. E. 2d 805, 813 (1984); *State* v. *Armstrong*, 110 Wis. 2d 555, 329 N. W. 2d 386, cert. denied, 461 U. S. 946 (1983).

[17] Hypnosis has been described as "involv[ing] the focusing of attention; increased responsiveness to suggestions; suspension of disbelief with a lowering of critical judgment; potential for altering perception, motor control, or memory in response to suggestions; and the subjective experience of responding involuntarily." Council Report, 253 J. A. M. A., at 1919.

[18] "[W]hen hypnosis is used to refresh recollection, one of the following outcomes occurs: (1) hypnosis produces recollections that are not substantially different from nonhypnotic recollections; (2) it yields recollections that are more inaccurate than nonhypnotic memory; or, most frequently, (3) it results in more information being reported, but these recollections contain both accurate and inaccurate details. . . . There are no data to support a fourth alternative, namely, that hypnosis increases remembering of only accurate information." *Id.*, at 1921.

thinks will be met with approval; the subject is likely to "confabulate," that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences "memory hardening," which gives him great confidence in both true and false memories, making effective cross-examination more difficult. See generally M. Orne et al., Hypnotically Induced Testimony, in Eyewitness Testimony: Psychological Perspectives 171 (G. Wells & E. Loftus, eds., 1984); Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 Calif. L. Rev. 313, 333–342 (1980). Despite the unreliability that hypnosis concededly may introduce, however, the procedure has been credited as instrumental in obtaining investigative leads or identifications that were later confirmed by independent evidence. See, *e. g., People* v. *Hughes*, 59 N. Y. 2d 523, 533, 453 N. E. 2d 484, 488 (1983); see generally R. Udolf, Forensic Hypnosis 11–16 (1983).

The inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards. One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. See Orne, The Use and Misuse of Hypnosis in Court, 27 Int'l J. Clinical and Experimental Hypnosis 311, 335–336 (1979). These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist. Suggestion will be less likely also if the hypnosis is conducted in a neutral setting with no one present but the hypnotist and the subject. Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked. *Id.*, at 336.[19] Such guidelines do not guarantee the accuracy of the testimony, because they cannot control the subject's own motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestions.

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[19] Courts have adopted varying versions of these safeguards. See n. 16, *supra*. Oregon by statute has a requirement for procedural safeguards for hypnosis. Ore. Rev. Stat. § 136.675 (1985).

The more traditional means of assessing accuracy of testimony also remain applicable in the case of a previously hypnotized defendant. Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions. Indeed, it is probably to a defendant's advantage to establish carefully the extent of his memory prior to hypnosis, in order to minimize the decrease in credibility the procedure might introduce.

We are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy. Arkansas, however, has not justified the exclusion of *all* of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections. The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.

In this case, the defective condition of the gun corroborated the details petitioner remembered about the shooting. The tape recordings provided some means to evaluate the hypnosis and the trial judge concluded that Doctor Back did not suggest responses with leading questions. See n. 3, *supra*. Those circumstances present an argument for admissibility of petitioner's testimony in this particular case, an argument that must be considered by the trial court. Arkansas' *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his own behalf.[20]

The judgment of the Supreme Court of Arkansas is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

In deciding that petitioner Rock's testimony was properly limited at her trial, the Arkansas Supreme Court cited several factors that undermine the reliability of hypnotically induced testimony. Like the Court today, the Arkansas Supreme Court observed that a hypnotized individual becomes subject to suggestion, is likely to confabulate, and experiences artificially increased confidence in both true and false memories following hypnosis. No known set of procedures, both courts agree, can insure against the inherently unreliable nature of such testimony. Having acceded to the factual premises of the Arkansas Supreme Court, the Court nevertheless concludes that a state trial court must attempt to make its own scientific assessment of reliability in each case it is confronted with a request for the admission of hypnotically induced testimony. I find no justification in the Constitution for such a ruling.

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[20] This disposition makes it unnecessary to consider petitioner's claims that the trial court's order restricting her testimony was unconstitutionally broad and that the trial court's application of the order resulted in a denial of due process of law. We also need not reach petitioner's argument that Arkansas' restriction on her testimony interferes with her Sixth Amendment right to counsel. Petitioner concedes that there is a "substantial question" whether she raised this federal question on appeal to the Arkansas Supreme Court. Reply Brief for Petitioner 2.

In the Court's words, the decision today is "bottomed" on recognition of Rock's "constitutional right to testify in her own defense." *Ante*, at 49. While it is true that this Court, in dictum, has recognized the existence of such a right, see, *e. g., Faretta* v. *California*, 422 U. S. 806, 819, n. 15 (1975), the principles identified by the Court as underlying this right provide little support for invalidating the evidentiary rule applied by the Arkansas Supreme Court.

As a general matter, the Court first recites, a defendant's right to testify facilitates the truth-seeking function of a criminal trial by advancing both the "'detection of guilt'" and "'the protection of innocence.'" *Ante*, at 50, quoting *Ferguson* v. *Georgia*, 365 U. S. 570, 581 (1961). Such reasoning is hardly controlling here, where advancement of the truth-seeking function of Rock's trial was the sole motivation behind limiting her testimony. The Court also posits, however, that "a rule that denies an accused the opportunity to offer his own testimony" cannot be upheld because, "[l]ike the truthfulness of other witnesses, the defendant's veracity . . . can be tested adequately by cross-examination." *Ante*, at 52. But the Court candidly admits that the increased confidence inspired by hypnotism makes "cross-examination more difficult," *ante*, at 60, thereby diminishing an adverse party's ability to test the truthfulness of defendants such as Rock. Nevertheless, we are told, the exclusion of a defendant's testimony cannot be sanctioned because the defendant "'above all others may be in a position to meet the prosecution's case.'" *Ante*, at 50, quoting *Ferguson* v. *Georgia*, *supra*, at 582. In relying on such reasoning, the Court apparently forgets that the issue before us arises only by virtue of Rock's memory loss, which rendered her less able "to meet the prosecution's case." 365 U. S., at 582.

In conjunction with its reliance on broad principles that have little relevance here, the Court barely concerns itself with the recognition, present throughout our decisions, that an individual's right to present evidence is subject always to reasonable restrictions. Indeed, the due process decisions relied on by the Court all envision that an individual's right to present evidence on his behalf is not absolute and must oftentimes give way to countervailing considerations. See, *e. g.*, *In re Oliver*, 333 U. S. 257, 273, 275 (1948); *Morrissey* v. *Brewer*, 408 U. S. 471, 481–482 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254, 263 (1970). Similarly, our Compulsory Process Clause decisions make clear that the right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973); see *Washington* v. *Texas*, 388 U. S. 14, 22 (1967). The Constitution does not in any way relieve a defendant from compliance with "rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers* v. *Mississippi*, *supra*, at 302. Surely a rule designed to exclude testimony whose trustworthiness is inherently suspect cannot be said to fall outside this description *

This Court has traditionally accorded the States "respect . . . in the establishment and implementation of their own criminal trial rules and procedures." 410 U. S., at 302–303; see, *e. g.*, *Marshall* v. *Lonberger*, 459 U. S. 422, 438, n. 6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"); *Patterson* v. *New York*, 432 U. S. 197, 201 (1977) ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"). One would think that this deference would be at its highest in an area such as this, where, as the Court concedes, "scientific understanding . . . is still in its infancy." *Ante*, at 61. Turning a blind eye to this concession, the Court chooses instead to restrict the ability of both state and federal courts to respond to changes in the understanding of hypnosis.

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*The Court recognizes, as it must, that rules governing "testimonial privileges [and] nonarbitrary rules that disqualify those incapable of observing events due to mental infirmity or infancy from being witnesses" do not "offend the defendant's right to testify." *Ante*, at 55–56, n. 11. I fail to discern any meaningful constitutional difference between such rules and the one at issue here.

The Supreme Court of Arkansas' decision was an entirely permissible response to a novel and difficult question. See National Institute of Justice, Issues and Practices, M. Orne et al., Hypnotically Refreshed Testimony: Enhanced Memory or Tampering with Evidence? 51 (1985). As an original proposition, the solution this Court imposes upon Arkansas may be equally sensible, though requiring the matter to be considered *res nova* by every single trial judge in every single case might seem to some to pose serious administrative difficulties. But until there is much more of a consensus on the use of hypnosis than there is now, the Constitution does not warrant this Court's mandating its own view of how to deal with the issue.

SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. *v.* SHUMAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-246. Argued April 20, 1987—Decided June 22, 1987

While serving a life sentence without possibility of parole upon a first-degree murder conviction, respondent was convicted of the capital murder of a fellow prisoner and sentenced to death under a Nevada statute mandating the death penalty in these circumstances. The State Supreme Court affirmed respondent's conviction and death sentence. The Federal District Court, in a habeas corpus proceeding, vacated the death sentence, holding that the mandatory capital-punishment statute violated the Eighth and Fourteenth Amendments. The Court of Appeals affirmed.

Held:

1. Under the individualized capital-sentencing doctrine, it is constitutionally required that the sentencing authority consider, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the particular offense. Pp. 70-76.

2. A statute that mandates the death penalty for a prison inmate who is convicted of murder while serving a life sentence without possibility of parole violates the Eighth and Fourteenth Amendments. Pp. 77-85.

791 F. 2d 788, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 86.

Brian McKay, Attorney General of Nevada, argued the cause for petitioners. With him on the briefs was *Brooke A. Nielsen*, Deputy Attorney General.

Daniel Markoff, by appointment of the Court, 481 U. S. 1004, argued the cause for respondent. With him on the brief was *N. Patrick Flanagan III*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Center for Constitutional Rights et al. by *William M. Kunstler*; and for Johnny Harris et al. by *Ruth A. Bourquin*, *Gary S. Guzy*, *Steven A. Reiss*, and *Stanley A. Teitler*.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether a statute that mandates the death penalty for a prison inmate who is convicted of murder while serving a life sentence without possibility of parole comports with the Eighth and Fourteenth Amendments.

I

In 1958, respondent Raymond Wallace Shuman was convicted in a Nevada state court of first-degree murder for the shooting death of a truckdriver during a roadside robbery. He was sentenced to life imprisonment without possibility of parole under § 200.030 of Nev. Rev. Stat., which at that time provided the jury with sentencing options of the death penalty or of life imprisonment with or without the possibility of parole. See 1957 Nev. Stats., ch. 238. In 1975, while serving his life sentence, Shuman was convicted of capital murder for the killing of a fellow inmate. Pursuant to the revised version of § 200.030 then in effect, Shuman's conviction mandated that he be sentenced to death.[1] The Nevada Supreme

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[1] After 1958, § 200.030 was amended several times. The statute in force at the time Shuman was convicted for the inmate murder and sentenced to death was enacted in 1973 and read in pertinent part as follows:

"1. Capital murder is murder which is perpetrated by:

. . . . .

"(b) A person who is under sentence of life imprisonment without possibility of parole.

. . . . .

"5. Every person convicted of capital murder shall be punished by death." 1973 Nev. Stats., ch. 798, § 5, pp. 1803–1804.

This statute remained in effect, with only slight modification, see 1975 Nev. Stats., ch. 740, p. 1580, until 1977. In that year, the Nevada Legislature provided for a separate penalty hearing. Under that version, still current, the sentencing authority must find that at least one statutory aggravating circumstance exists in order to impose the death penalty. See Nev. Rev. Stat. § 200.030.4(a) (1985). One of the listed aggravating circumstances is when the murder is "committed by a person under sentence of imprisonment." § 200.033.1. The sentencing authority, however, may

Court affirmed Shuman's conviction and the imposition of the death penalty. It specifically rejected respondent's claims of error, including his objection that the mandatory imposition of the death sentence violated his rights under the Eighth and Fourteenth Amendments. *Shuman* v. *State*, 94 Nev. 265, 578 P. 2d 1183 (1978).

Shuman unsuccessfully pursued his challenge to the mandatory capital-punishment statute in a state habeas petition. After exhausting state remedies, Shuman filed a petition in Federal District Court seeking habeas corpus relief under 28 U. S. C. §2254. The District Court rejected all his claims except his challenge to the constitutionality of the mandatorily imposed death sentence. *Shuman* v. *Wolff*, 571 F. Supp. 213 (Nev. 1983).

The District Court acknowledged that in several cases this Court had reserved judgment on the question whether a mandatory death penalty may be justified in the case of an inmate serving a life sentence who is convicted of murder. *Id.*, at 216. The District Court reasoned, however, that under the rule set forth in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), that capital-sentencing authorities be permitted to consider any relevant mitigating circumstance in their decision, Shuman's death sentence was invalid. 571 F. Supp., at 216–218. It found that the availability of a nonmandatory death penalty was a sufficient deterrent to life-term inmates and that making a death sentence mandatory "only serves to give the imposition of the death sentence the air of arbitrariness and caprice." *Id.*, at 217. It held that §200.030.1(b) in effect at the time Shuman was sentenced to death therefore violated the Eighth and Fourteenth Amendments, and it ordered that Shuman's death sentence be vacated. The Dis-

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consider any relevant mitigating circumstance. See §200.035, set forth in n. 10, *infra*.

Respondent's inmate murder thus took place during the 4-year period from 1973 to 1977 when the mandatory death penalty was imposed by Nevada law.

trict Court noted, however, that the State was not foreclosed from initiating and completing "lawful resentencing proceedings." 571 F. Supp., at 218.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's judgment. *Shuman* v. *Wolff*, 791 F. 2d 788 (1986). That court also noted that we had left open the question of the constitutionality of the type of mandatory statute at issue in this case, see *id.*, at 792, but it discounted what it perceived to be the two possible rationales justifying a statute of that kind. It first rejected the argument that the mandatory statute provided adequate individualized consideration. It reasoned that the fact that Shuman was serving a life sentence without possibility of parole did not render it unnecessary for a sentencing authority to be permitted to consider relevant mitigating circumstances in deciding whether to sentence him to death. The court identified possibly relevant circumstances, such as the conduct that led to the imposition of the life sentence and the "age and the mental or emotional state of the defendant, the provocation for the killing, the pressure from other inmates, and the record of the defendant in prison since the first offense." *Id.*, at 795.

The Court of Appeals also rejected the argument that the mandatory statute was necessary as a deterrent for life-term inmates. *Ibid.* It found that any deterrent effect of capital punishment exists under statutes that provide individualized capital-sentencing determinations. In closing, it voiced its agreement with the Court of Appeals of New York that a "'mandatory death statute simply cannot be reconciled with the scrupulous care the legal system demands to insure that the death penalty fits the individual and the crime.'" *Id.*, at 796, quoting *People* v. *Smith*, 63 N. Y. 2d 41, 78, 468 N. E. 2d 879, 897 (1984), cert. denied, 469 U. S. 1227 (1985).

We granted certiorari, 479 U. S. 948 (1986), to resolve this question of the constitutionality of a death sentence imposed, pursuant to a mandatory capital-sentencing statutory procedure, on an inmate serving a life sentence.

II

A

The Nevada statute under which Shuman was sentenced to death was in force for four years. It was enacted shortly after this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, and was repealed soon after the decisions in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). Prior to *Furman*, the Nevada capital-sentencing statute simply provided that, after a person was convicted of first-degree murder, the jury was to fix the penalty at death or life imprisonment, *with or without* possibility of parole, except that in cases of persons already serving a sentence of life imprisonment the penalty was to be death or life imprisonment *without* possibility of parole. See 1967 Nev. Stats., ch. 523, §438, p. 1470. The statute provided no guidance to the jury about how to make the sentencing decision or what, if any, individual factors it was to consider.

In *Furman*, this Court, in effect, invalidated all such capital-punishment statutes because of its conclusion that statutes permitting juries absolute discretion in making the capital-sentencing determination resulted in the death penalty's being arbitrarily and capriciously imposed, in violation of the Eighth and Fourteenth Amendments. On May 3, 1973, less than a year after *Furman*, the Nevada Legislature replaced its unguided-discretion statute with one that created a category of "capital murder." The new statute provided a list of situations, which, if found to exist in conjunction with the murder, would render the killing a "capital murder." The statute mandated that the death penalty was to be imposed on all persons convicted of those offenses. See n. 1, *supra.* The legislature specifically explained in the statute's preamble that the mandatory statute was intended to prevent the arbitrary and capricious imposition of the death penalty. See 1973 Nev. Stats., ch. 798, p. 1801. This was the statute under which respondent was sentenced to death.

Nevada's adoption of a mandatory-sentencing scheme represented one of the two responses of various States to the *Furman* decision. Although every State had abandoned mandatory capital-sentencing procedures prior to *Furman* because they had proved unsatisfactory, see *Woodson* v. *North Carolina*, 428 U. S., at 291–292 (plurality opinion), some States, including Nevada, enacted mandatory statutes after *Furman*. Those States read the several opinions supporting the judgment in *Furman* as a signal that mandatory-sentencing procedures would avoid the arbitrary and capricious pitfalls of unguided discretionary procedures. See *Woodson* v. *North Carolina*, 428 U. S., at 298–299 (plurality opinion); *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S. 325, 328–329, 331 (1976) (plurality opinion). See also *Furman* v. *Georgia*, 408 U. S., at 413 (dissenting opinion, where this alternative was forecast). Other States, however, maintained individualized sentencing, but narrowed the category of offenses to which the penalty could be applied, bifurcated the trial to provide a separate sentencing proceeding, and provided guidance to the sentencing authority about how to determine the appropriateness of the death penalty in a particular case. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S., at 162–168 (opinion of Stewart, POWELL, and STEVENS, JJ.). The Court on prior occasions has recognized these differing responses to *Furman* and the uncertain state of capital-punishment law following that decision. See *Woodson* v. *North Carolina*, 428 U. S., at 298–299 (plurality opinion); *Lockett* v. *Ohio*, 438 U. S. 586, 599–600 (1978).

The Court's opinions in 1976 addressing the constitutionality of five post-*Furman* state statutes did much to clarify what standards must be met to render a capital-punishment statute facially constitutional. In explaining why the guided-discretion statutes of Georgia, Florida, and Texas were facially valid, but the mandatory statutes of North Carolina and Louisiana were not, the Court relied to a significant degree on the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case. See *Gregg* v. *Georgia*, 428 U. S., at 189–195 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Proffitt* v. *Florida*, 428 U. S. 242, 252–253 (1976) (same); *Jurek* v. *Texas*, 428 U. S. 262, 271–272 (1976) (same); *Woodson* v. *North Carolina*, 428 U. S., at 303–305 (plurality opinion); *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S., at 333–335 (plurality opinion). The principal opinions in these cases established that in capital cases, "it is *constitutionally* required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." *Gregg* v. *Georgia*, 428 U. S., at 189–190, n. 38 (emphasis added); see also, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S., at 304.

In the year following these decisions, the Nevada Legislature replaced its mandatory statute with a guided-discretion statute similar to the Georgia legislation upheld in *Gregg*. See 1977 Nev. Stats., ch. 430, § 82, p. 864; ch. 585, §§ 1–10, pp. 1541–1545. Nevada's repeal of its mandatory capital-sentencing statute was consistent with the nationwide trend after *Gregg* and *Woodson* that has resulted in legislative repeal or judicial invalidation of all such statutes.[2]

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[2] Nine of the eleven States that had a mandatory death-penalty statute applicable to life-term inmates in the 1970's, including Nevada, have repealed or amended the statutes by legislative enactment. See Ala. Code § 13-1-75 (1975), repealed by 1977 Ala. Acts, Act No. 607, § 9901, and current provision at Ala. Code §§ 13A-5-39 to 13A-5-59 (1982 and Supp. 1986); 1973 Cal. Stats., ch. 719, § 13, amended by 1977 Cal. Stats., ch. 316, §§ 21-26, pp. 1264-1266, and current provision at Cal. Penal Code Ann. § 4500 (West Supp. 1987); Ind. Code Ann. § 10-3401(b)(6)(iv) (Burns Supp.

B

It is important to examine once again the establishment of the individualized capital-sentencing doctrine in this Court's opinions issued in 1976 and the development of that doctrine in the ensuing decade, before determining whether an exception is justified in the present case. In each of the five death-penalty cases decided in 1976, the Court's judgment rested on a joint opinion of Justices Stewart, POWELL and

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1975), amended and current provision at Ind. Code §§ 35–50–2–3 and 35–50–2–9 (1982 and Supp. 1986); La. Rev. Stat. Ann. § 14:30(3) (West 1951, Supp. 1974), amended by 1976 La. Acts, No. 657, § 1, and current provision at La. Rev. Stat. Ann. § 14:30 (West 1986); 1974 Miss. Gen. Laws, ch. 576, § 7, p. 867, amended and current provision at Miss. Code Ann. §§ 97–3–19, 97–3–21, 99–19–101, 99–19–103, 99–19–105, and 99–19–107 (Supp. 1986); 1973 Nev. Stats., ch. 798, § 5, pp. 1803–1804, amended and current provision at Nev. Rev. Stat. § 200.030 (1985); 1973 Okla. Sess. Laws, ch. 167, §§ 1, 3, pp. 240–241, repealed by 1976 Okla. Sess. Laws, 1st Extr. Sess., ch. 1, § 10, p. 630, and current provision at Okla. Stat., Tit. 21, §§ 701.7, 701.9 to 701.15 (1981 and Supp. 1986); Va. Code §§ 18.2–10(a) and 18.2–31(c) (1975), amended and current provision at Va. Code §§ 18.2–10(a) (1982), §§ 19.2–264.2 and 19.2–264.3 (1983); Wyo. Stat. § 6–54(b)(v) (Supp. 1975), and current provision at Wyo. Stat. §§ 6–2–101 to 6–2–103 (1983).

The mandatory capital-sentencing statutes for life-term inmates in the other States were struck down as unconstitutional by state courts. See *People* v. *Smith*, 63 N. Y. 2d 41, 468 N. E. 2d 879 (1984), cert. denied, 469 U. S. 1227 (1985); *State* v. *Cline*, 121 R. I. 299, 397 A. 2d 1309 (1979); see also *Graham* v. *Superior Court of City and County of San Francisco*, 98 Cal. App. 3d 880, 160 Cal. Rptr. 10 (1979) (invalidating death sentence imposed under mandatory statute that had been subsequently repealed by legislature); see generally Acker, Mandatory Capital Punishment for the Life Term Inmate Who Commits Murder: Judgments of Fact and Value in Law and Social Science, 11 New England J. Crim. & Civ. Confinement 267, 272, n. 16, 287–289, n. 45 (1985) (Acker).

As is evident from the litigation before us, however, Shuman's death sentence was not affected by the new Nevada statute. The death sentences imposed on two life-term inmates under the Alabama mandatory capital-sentencing statute also were not affected when that State's legislature repealed its statute. These two persons appear to be the only other individuals currently under a sentence of death that was imposed under a mandatory procedure. See Brief for Johnny Harris and Donald Thigpen as *Amici Curiae* 2.

STEVENS. Those five opinions, reflecting the views of the only Members of the Court to vote in support of all five judgments, drew a critical line between post-*Furman* statutes that could survive constitutional scrutiny and those that could not. In the three cases upholding the guided-discretion statutes, the opinions emphasized the fact that those capital schemes permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual. See *Gregg* v. *Georgia*, 428 U. S., at 197, 206; *Proffitt* v. *Florida*, 428 U. S., at 251–252; *Jurek* v. *Texas*, 428 U. S., at 270–271. In the two cases striking down as unconstitutional mandatory capital-sentencing statutes, the opinions stressed that one of the fatal flaws in those sentencing procedures was their failure to permit presentation of mitigating circumstances for the consideration of the sentencing authority. See *Woodson* v. *North Carolina*, 428 U. S., at 303–305; *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S., at 333–334.

The *Woodson* opinion explained: "While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." 428 U. S., at 303. The shortcomings of a mandatory capital-sentencing procedure were set forth:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of

> a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.*, at 304.

The opinion went on to specify that unlike individualized-sentencing procedures in noncapital cases that were simply a matter of policy, such procedures in capital cases were of constitutional significance:

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Ibid.*[3]

The constitutional mandate of individualized determinations in capital-sentencing proceedings continued to guide this Court's review of capital-punishment statutes in the ensuing decade. It led the Court to invalidate another aspect of Louisiana's mandatory statute the following year. See *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633, 637 (1977) *(per curiam)*. It also has had a significant impact on our decisions in cases where the sentencing authority's consideration of mitigating circumstances had been restrained in some manner. Beginning with *Lockett* v. *Ohio*, 438 U. S. 586 (1978), a plurality of the Court recognized that in order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense." *Id.*, at 604 (emphasis in original). In *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), a majority of the Court accepted the *Lockett* plurality's approach. Not only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but "*Lockett* requires the sentencer to listen" to that evidence. 455 U. S., at 115, n. 10.[4] Finally, earlier this Term, in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987), the Court, by a unanimous vote, invalidated a death sentence because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." *Id.*, at 398–399. We unequivocally relied on the rulings in *Lockett* v. *Ohio*, and *Eddings* v. *Oklahoma*, that the Eighth and Fourteenth Amendments require that the sentencing authority be permitted to consider any relevant mitigating evidence before imposing a death sentence. 481 U. S., at 394 and 398–399.[5]

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[3] In rejecting the mandatory capital-sentencing provision before the Court in *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S. 325 (1976), the plurality acknowledged that the provision was drawn more narrowly than the North Carolina statute at issue in *Woodson*, but it emphasized: "The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" 428 U. S., at 333, quoting *Williams* v. *New York*, 337 U. S. 241, 247 (1949).

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[4] JUSTICE O'CONNOR, in concurring, concluded that "the reasoning of the plurality opinion in *Lockett* compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Eddings* v. *Oklahoma*, 455 U. S., at 119, quoting *Lockett*, 438 U. S., at 605.

[5] We also relied on *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), where we reinforced the constitutional significance of the capital-sentencing authority's consideration of evidence that "would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Id.*, at 4–5, quoting *Lockett* v. *Ohio*, 438 U. S., at 604.

In still another decision earlier this Term, several Members of the Court again acknowledged the constitutional significance of this principle. See *California* v. *Brown*, 479 U. S. 538, 541 (1987) (noting that one of the central principles established by this Court's Eighth Amendment jurisprudence is that consideration of a defendant's character or record, and the circumstances of the offense are a "'constitutionally indispensable part of the process of inflicting the penalty of death,'" quoting *Woodson* v. *North*

III

Although the above explication of the development and current status of this constitutional doctrine itself would appear to resolve the question presented by this case, the Nevada statute at issue here applies to the particular situation of a life-term inmate who has been convicted of murder, and we have reserved judgment on the constitutionality of such a statute. We have declined to determine whether a mandatory statute applied to life-term inmates could withstand constitutional scrutiny, noting that perhaps the "extrem[e] narrow[ness]" of such a statute, see *Woodson* v. *North Carolina*, 428 U. S., at 287, n. 7 (plurality opinion), or a particular deterrence concern, see *Gregg* v. *Georgia*, 428 U. S., at 186 (joint opinion); *Lockett* v. *Ohio*, 438 U. S., at 604, n. 11 (plurality opinion), could render individualized sentencing unnecessary. See also *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S., at 334, n. 9 (plurality opinion); *Roberts (Harry)* v. *Louisiana*, 431 U. S., at 637, n. 5.[6] After consideration

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Carolina, 428 U. S. 280, 304 (1976)); 479 U. S., at 545 (concurring opinion) ("*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime") (emphasis in original).

[6] Acceptance of petitioners' assertion that the language used in the opinions reserving judgment on this matter "imports more than merely leaving the question open," Brief for Petitioners 21, of course would defeat the entire purpose of deferring resolution of the issue. Petitioners' attempt to evade the expressed intent to leave the question open until it was presented directly is especially inappropriate when the very cases on which we focus today provide several examples of this prudent approach to development of constitutional doctrine. Compare *Gregg* v. *Georgia*, 428 U. S. 153, 187, n. 35 (1976) (reserving judgment on question whether death penalty could constitutionally be imposed as sanction for crime such as rape that did not result in death of victim), with *Coker* v. *Georgia*, 433 U. S. 584 (1977) (declaring death penalty to be constitutionally disproportionate sanction for rape of an adult); compare *Woodson* v. *North Carolina*, 428 U. S., at 305, n. 40 (plurality opinion) (reserving judgment on question

of this case, which places the issue squarely before us, we conclude that a departure from the individualized capital-sentencing doctrine is not justified and cannot be reconciled with the demands of the Eighth and Fourteenth Amendments.

A

The Nevada mandatory capital-sentencing statute under which Shuman was sentenced to death precluded a determination whether any relevant mitigating circumstances justified imposing on him a sentence less than death. Redefining the offense as capital murder and specifying that it is a murder committed by a life-term inmate revealed only two facts about respondent—(1) that he had been convicted of murder while in prison, and (2) that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole. These two elements had to be established at Shuman's trial to support a verdict of guilty of capital murder. After the jury rendered that verdict of guilty, all that remained for the trial judge to do was to enter a judgment of conviction and impose the death sentence. The death sentence was a foregone conclusion.

These two elements of capital murder do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case. The fact that a life-term inmate is convicted of murder does not reflect whether any circumstance existed at the time of the murder that may have lessened his responsibility for his acts even though it could not stand as a legal defense to the mur-

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whether death penalty could constitutionally be imposed on individual who was not at actual scene of robbery that resulted in the two fatal shootings for which he was convicted), with *Enmund* v. *Florida*, 458 U. S. 782 (1982) (death penalty is constitutionally disproportionate punishment unless defendant killed, attempted to kill, intended to kill, or intended that lethal force be used), and *Tison* v. *Arizona*, 481 U. S. 137 (1987) (death penalty constitutionally proportionate in case where defendant is major participant in felony committed, combined with reckless indifference to human life).

der charge. This Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime. See, *e. g.*, *Tison* v. *Arizona*, 481 U. S. 137 (1987); *Enmund* v. *Florida*, 458 U. S. 782 (1982). Just as the level of an offender's involvement in a routine crime varies, so too can the level of involvement of an inmate in a violent prison incident.[7] An inmate's participation may be sufficient to support a murder conviction, but in some cases it may not be sufficient to render death an appropriate sentence, even though it is a life-term inmate or an inmate serving a particular number of years who is involved.[8]

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[7] The variety of circumstances that may surround a murder by a life-term inmate is illustrated by examining the facts of Shuman's case and the facts in the cases of the other two life-term inmates currently under a mandatorily imposed sentence of death. Shuman was convicted of capital murder for the killing of a fellow inmate by burning him with a flammable liquid. *Shuman* v. *State*, 94 Nev. 265, 267, 578 P. 2d 1183, 1184 (1978). The incident apparently resulted from a fight about opening a window near their cells. *Ibid.*

In *Harris* v. *State*, 352 So. 2d 460 (Ala. Crim. App. 1976), aff'd, 352 So. 2d 479 (Ala. 1977), denial of petition for writ of error *coram nobis* aff'd, 367 So. 2d 524 (Ala. Crim. App. 1978), review denied, *Ex parte Harris*, 367 So. 2d 534 (Ala. 1979), the life-term inmate was convicted of first-degree murder for the killing of a guard that occurred during a prison uprising. He denied participating in the stabbing of the guard and claimed that he was coerced into participating in the uprising because he feared for his life. In his opinion dissenting from the affirmance of the inmate's death sentence, Chief Justice Torbert explained: "The constitutional inadequacy of [the mandatory-sentencing procedure] is accentuated by the facts in this case. The defendant . . . , though found guilty of first degree murder, presented evidence that his participation in the prison riot was coerced by his fellow inmates. Though this does not constitute a defense for his crime, it is obviously a factor which could mitigate against the death penalty, and therefore should be considered in the sentencing procedure." 352 So. 2d, at 488.

Thigpen v. *State*, 355 So. 2d 392 (Ala. Crim. App.), aff'd, 355 So. 2d 400 (Ala. 1977), denial of petition for writ of *coram nobis* aff'd, 372 So. 2d 385 (Ala. Crim. App.), review denied, *Ex parte Thigpen*, 372 So. 2d 387 (Ala. 1979), cert. denied, 444 U. S. 1026 (1980), presents the situation where a life-term inmate is convicted of a murder outside the prison environment. Thigpen was convicted of first-degree murder for the killing of a farmer, committed during an escape attempt in which he participated, by a fellow inmate using a fencepost. 355 So. 2d, at 395. See also Acker, at 310

The simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death. It does not specify for what offense the inmate received a life sentence nor does it permit consideration of the circumstances surrounding that offense or the degree of the inmate's participation. At the time respondent Shuman was

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("Prison murders range from contract-like killings, to victim-precipitated homicides, such as in defense of or in retaliation to homosexual assault, to the slaying of correctional officers during prison riots") and n. 84.

The Nevada Board of Prison Commissioners recognizes that murders in prison involve a range of behavior and may reflect a range of individual responsibility. In the Nevada Department of Prisons' Code of Penal Discipline, the offense of murder of an inmate yields a typical disciplinary segregation term of three years if it is placed in the "low section," four years if it is placed in the "medium section," and five years if it is placed in the "high section." See App. to Postargument Letter of May 14, 1987, from Respondent, Exh. I, pp. 26–27. The Code explains: "The decision on which section to use is based on factors of mitigation and aggravation." *Id.*, at 25. The factors that merit three years of disciplinary segregation instead of five years also may justify a sentence less than death in a case of a particular life-term inmate.

[8] Mandating that sentences imposed on inmates serving life terms be different from sentences imposed on other inmates could produce the odd result of a riot's more culpable participant's being accorded a less harsh sentence than the less culpable participant simply because the less culpable one is serving a life sentence and the more culpable one is serving a sentence of years. For example, in an opinion dissenting from the affirmance of Harris' death sentence, Justice Jones thought the fact should not be overlooked that "[w]hatever the extent of Harris's participation in the killing . . . , the avowed ring leader of this affray was another prisoner . . . . He was implicated from beginning to end by each of the witnesses who testified. His trial for this murder resulted in a sentence of 31 years in prison." *Harris* v. *State*, 352 So. 2d, at 497.

sentenced to death, Nevada law authorized imposition of a life sentence without possibility of parole as a sanction for offenders convicted of a number of offenses other than murder. See, *e. g.*, 1973 Nev. Stats., ch. 798, §§6–8, pp. 1804–1805 (authorizing sentence of life without possibility of parole for kidnaping, rape, and battery with substantial bodily harm). Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, but the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense. The circumstances surrounding any past offense may vary widely as well. Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label "life-term inmate" reveals little about the inmate's record or character. Even if the offense was first-degree murder, whether the defendant was the primary force in that incident, or a nontriggerman like Shuman, may be relevant to both his criminal record and his character.[9] Yet under the mandatory statute, all predicate life-term offenses are given the same weight—a weight that is deemed to outweigh any possible combination of mitigating circumstances.

Not only do the two elements that are incorporated in the mandatory statute serve as incomplete indicators of the circumstances surrounding the murder and of the defendant's criminal record, but also they say nothing of the "[c]ircumstances such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct." *Roberts (Harry)* v. *Louisiana*, 431 U. S., at 637. In Shuman's case, a sentencing authority may likely find relevant his behavior during his 15 years of incarceration, including whether the inmate murder was an isolated incident of violent behavior or merely the most recent in a long line of such incidents. There is no reason to believe that several of the mitigating circumstances listed in Nevada's current guided-discretion statute[10] could not be equally applicable to a murder committed by a life-term inmate. Hence, the mandatory capital-sentencing procedure pursuant to which Shuman's death sentence was imposed "create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty." *Lockett* v. *Ohio*, 438 U. S., at 605.

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[9] Shuman's confession to the 1958 offense and the confession of his codefendant, Melvin Rowland, revealed that Rowland shot the truckdriver while Shuman remained in a car. *Shuman* v. *Wolff*, 791 F. 2d 788, 789 (CA9 1986). In *Harris* v. *State*, 367 So. 2d, at 526, the defendant's sentence of life imprisonment resulted from his guilty pleas to four charges of robbery and one charge of rape. Apparently, each of those offenses was classified as a capital offense at the time committed and could have resulted in a death sentence. *Id.*, at 532. See also S. Minor-Harper & L. Greenfeld, Bureau of Justice Statistics, Special Report, Prison Admissions and Releases, 1982, p. 10, Table 15 (1985) (reflecting that over 35% of life terms imposed in this country in 1982 were for offenses other than murder).

B

A mandatory capital-sentencing procedure for life-term inmates is not necessary as a deterrent. An inmate who is serving a life sentence is not immune from Nevada's death penalty if he is convicted of murder. The fact that a State provides a guided-discretion sentencing procedure does not undermine any deterrent effect that the threat of the death penalty may have. Those who deserve to die according to the judgment of the sentencing authority will be condemned to death under such a statute.

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[10] The current statute reads:

"Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:

"1. The defendant has no significant history of prior criminal activity.

"2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"3. The victim was a participant in the defendant's criminal conduct or consented to the act.

"4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

"5. The defendant acted under duress or under the domination of another person.

"6. The youth of the defendant at the time of the crime.

"7. Any other mitigating circumstance." Nev. Rev. Stat. § 200.035 (1985).

The force of the deterrent argument for this mandatory statute is weakened significantly by the fact that every prison system in the country is currently operating without the threat of a mandatory death penalty for life-term inmates. See n. 2, *supra*. The fact that the Nevada Legislature saw fit to repeal the specific statute at issue here a decade ago seriously undermines petitioners' contention that such a statute is required as a deterrent. Close consideration of the deterrence argument also points up the fact that there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy.

We also reject the proposition that a mandatory death penalty for life-term inmates convicted of murder is justified because of the State's retribution interests. The argument is that the death penalty must be mandatory for life-term inmates because there is no other available punishment for one already serving a sentence of life imprisonment without possibility of parole.[11] Again, it must be emphasized that under

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[11] For the sake of argument, we premise our analysis here on a life sentence without possibility of parole which Nevada purportedly imposed on respondent Shuman. In cases such as Harris' and Thigpen's where the inmate is sentenced to life with possibility of parole, the most obvious sanction is to withdraw the parole possibility.

We discovered during oral argument of this case, however, that this in fact could be a meaningful sanction in Shuman's case as well because the first sentence of "life without possibility of parole" may not ultimately mean in Nevada what it seems to say. See Tr. of Oral Arg. 30–38. In a guided-discretion statute, a life-term inmate does not evade the imposition of the death sentence if the sentencing authority reaches the conclusion, after individualized consideration, that the inmate merits execution by the State.[12] Moreover, there are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization. In any event, even the retribution interests of the State cannot be characterized according to a category of offense because "[s]ociety's legitimate desire for retribution is less strong with respect to a defendant who played a minor role in the murder for which he was convicted." *Skipper* v. *South Car-*

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response to a request from the Court during oral argument, respondent has submitted public records that reveal that Melvin Rowland, who was convicted of the same first-degree murder in 1958 and also sentenced to life without possibility of parole, is currently *on parole*. On May 19, 1975, the Nevada Board of Pardons commuted Rowland's sentence to life with possibility of parole. See App. to Postargument Letter of May 14, 1987, from Respondent, Exh. A. On August 26, 1977, the Nevada Board of Parole Commissioners granted Rowland parole. Exh. B. Moreover, since 1975, 17 persons who had been sentenced in Nevada to life without possibility of parole in fact have been paroled. Exh. F. Five others have had their sentences commuted to life with possibility of parole so that release remains a realistic hope for them. *Ibid.* We do not mean to suggest that such a program is not appropriate; it does indicate, however, that in some cases a prison's rehabilitative efforts appear to yield positive results. Nevertheless, it is somewhat misleading, or at least confusing, to argue that the death penalty is the only real sanction that could be imposed on Shuman to punish him for his action while incarcerated. See also Acker, at 321–324, and 289, n. 46 (most life-term inmates in this country have realistic expectation of parole).

[12] The experience in at least one State suggests that mitigation does exist in some cases of life-term inmates convicted of murder. See Brief for Johnny Harris and Donald Thigpen as *Amici Curiae* 17–18, n. 26 (data indicating that during periods when state statute accorded juries discretion in capital sentencing, life sentences were imposed by Alabama juries where life-term inmates were convicted of murder).

olina, 476 U. S. 1, 13 (1986) (opinion concurring in judgment). Although a sentencing authority may decide that a sanction less than death is not appropriate in a particular case, the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence.[13]

IV

In sum, any legitimate state interests can be satisfied fully through the use of a guided-discretion statute that ensures adherence to the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures. Having reached unanimity on the constitutional significance of individualized sentencing in capital cases, we decline to depart from that mandate in this case today. We agree with the courts below that the statute under which respondent Shuman was sentenced to death did not comport with the Eighth and Fourteenth Amendments.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[13] Elimination of the mandatory-sentencing procedure also eliminates the problem of the possibility of jury nullification which has been known to arise under mandatory schemes. See *Woodson* v. *North Carolina*, 428 U. S., at 293, 294, n. 29 (plurality opinion). If a jury does not believe that a defendant merits the death sentence and it knows that such a sentence will automatically result if it convicts the defendant of the murder charge, the jury may disregard its instructions in determining guilt and render a verdict of acquittal or of guilty of only a lesser included offense. The situation presented by a life-term inmate may present another jury nullification problem if the jury believes that the only manner of punishing a life-term inmate would be execution. In such circumstances undeserved convictions for capital murder could result. Although the jury may believe that the defendant is guilty only of manslaughter, it might still convict of the greater offense because the jurors believe there is no other means of punishment. The guided-discretion statutes that we have upheld, as

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Today the Court holds that the Eighth Amendment prohibits a State from imposing a mandatory death sentence on a prisoner who, while serving a life term for a first-degree murder conviction, murders a fellow inmate. The Court reasons that the Constitution requires that such an inmate be afforded the opportunity to present mitigating evidence to the sentencer, and, in so reasoning, quite obviously assumes that cases will arise under the type of statute at issue here in which an inmate will be able, through the presentation of such mitigating evidence, to persuade a sentencer not to impose a death sentence. In my view, the Constitution does not bar a state legislature from determining, in this limited class of cases, that, as a matter of law, no amount of mitigating evidence could ever be sufficient to outweigh the aggravating factors that characterize a first-degree murder committed by one who is already incarcerated for committing a previous murder and serving a life sentence. Accordingly, I dissent.

I dissented from the decisions holding that the Eighth Amendment prohibits the mandatory death-sentencing schemes involved in those cases. *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S. 325, 358–363 (1976) (WHITE, J., joined by Burger, C. J., BLACKMUN and REHNQUIST, JJ., dissenting); *Woodson* v. *North Carolina*, 428 U. S. 280, 306–307 (1976). But even if those decisions are accepted opinions, neither they nor the other cases requiring individualized sentencing for capital defendants compel the result the Court reaches today. Indeed, the Court has expressly and repeatedly reserved the issue addressed in this case, see *Roberts (Stanislaus)* v. *Louisiana*, *supra*, at 334, n. 9; *Rob-*

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well as the current Nevada statute, provide for bifurcated trials in capital cases to avoid nullification problems. Bifurcating the trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other.

erts (Harry) v. *Louisiana*, 431 U. S. 633, 637, n. 5 (1977); *Lockett* v. *Ohio*, 438 U. S. 586, 604, n. 11 (1978); *McCleskey* v. *Kemp*, 481 U. S. 279, 304, n. 26 (1987), signaling rather clearly that the rationale underpinning the individualized sentencing requirement does not inexorably lead to a conclusion that mandatory death-sentencing schemes of the type involved here offend the Constitution. Until today, the Court has never held that the Constitution prohibits a State from identifying an especially aggravated and exceedingly narrow category of first-degree murder, such as the crime for which respondent stands convicted, and determining as a matter of law and social policy that no combination of mitigating factors, short of an actual defense to the crime charged, could ever warrant reduction of a sentence of death. I thus do not accept the majority's assertion that "[t]he fact that a life-term inmate is convicted of murder does not reflect whether any circumstance existed at the time of the murder that may have lessened his responsibility for his acts even though it could not stand as a legal defense to the murder charge." *Ante*, at 78–79. An inmate serving a life sentence who is convicted of capital murder and who is *legally* responsible for his actions, that is, one who does not have a meritorious defense recognized as relieving the inmate of such responsibility, has, in my view, no constitutional right to persuade the sentencer to impose essentially no punishment at all for taking the life of another, whether guard or inmate.

I also reject the majority's assertion that this kind of mandatory capital-sentencing scheme is not necessary as a deterrent because the inmate who commits capital murder is still subject to the death penalty for that crime. See *ante*, at 82–83. But the majority holds that all inmates serving life sentences who commit capital murder must have the opportunity to persuade the sentencers that the death penalty should not be imposed. Moreover, the assumption is that some of them will succeed, thereby inevitably lessening the deterrent effect of the death penalty. As I see it, a State does not violate the Eighth Amendment by maintaining the full deterrent effect of the death penalty in this kind of case and by insisting that those who murder while serving a life sentence without parole not be able to escape punishment for that crime.

COMMISSIONER OF INTERNAL REVENUE *v.* FINK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86–511. Argued April 27, 1987—Decided June 22, 1987

In an unsuccessful effort to increase the attractiveness of their financially troubled corporation to outside investors, respondents voluntarily surrendered some of their shares to the corporation, thereby reducing their combined percentage ownership from 72.5 percent to 68.5 percent. Respondents received no consideration for the surrendered shares, and no other shareholders surrendered any stock. The corporation eventually was liquidated. On their 1976 and 1977 joint federal income tax returns, respondents claimed ordinary loss deductions for the full amount of their adjusted basis in the surrendered shares. The Commissioner of Internal Revenue disallowed the deductions, concluding that the surrendered stock was a contribution to the corporation's capital, and that, accordingly, the surrender resulted in no immediate tax consequences and respondents' basis in the surrendered shares should be added to the basis of their remaining shares. The Tax Court sustained the Commissioner's determination, but the Court of Appeals reversed, ruling that respondents were entitled to deduct their basis in the surrendered shares immediately as an ordinary loss less any resulting increase in the value of their remaining shares.

Held: A dominant shareholder who voluntarily surrenders a portion of his shares to the corporation, but who retains control of the corporation, does not sustain an immediate loss deductible for income tax purposes. Rather, the rule applicable to contributions to capital applies, so that the surrendering shareholder must reallocate his basis in the surrendered shares to the shares he retains, and deduct his loss, if any, when he disposes of the remaining shares. This rule is not rendered inapplicable simply because a stock surrender is not a contribution to capital in the strict accounting sense, or because, unlike a typical contribution to capital, a surrender reduces the shareholder's proportionate interest in the corporation. Where, as here, a closely held corporation's shares are not traded on an open market, a stock surrender to that corporation often will not meet the requirement that an immediately deductible loss must be actually sustained during the taxable year, since there will be no reliable method of determining whether the surrender has resulted in a loss until the shareholder disposes of his remaining shares. Moreover, treating stock surrenders as ordinary losses might encourage shareholders in failing corporations to convert potential capital losses to ordinary losses by voluntarily surrendering their shares before the corporation fails, thereby avoiding the consequences of the rule requiring capital loss treatment for stock that becomes worthless. Similarly, shareholders might be encouraged to transfer corporate stock rather than other property to the corporation in order to realize a current loss. Pp. 95–100.

789 F. 2d 427 reversed.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 100. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 100. BLACKMUN, J., concurred in the result. STEVENS, J., filed a dissenting opinion, *post*, p. 101.

Alan I. Horowitz argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Olsen*, *Deputy Solicitor General Lauber*, and *Jonathan S. Cohen*.

Matthew J. Zinn argued the cause for respondents. With him on the brief were *Susan H. Serling*, *J. Walker Johnson*, *W. Merritt Jones, Jr.*, and *Mark K. Wilson*.*

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a dominant shareholder who voluntarily surrenders a portion of his shares to the corporation, but retains control, may immediately deduct from taxable income his basis in the surrendered shares.

I

Respondents Peter and Karla Fink were the principal shareholders of Travco Corporation, a Michigan manufacturer of motor homes. Travco had one class of common stock outstanding and no preferred stock. Mr. Fink owned 52.2 percent, and Mrs. Fink 20.3 percent, of the outstanding

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**Patrick J. Carr* filed a brief for Leroy Frantz, Jr., as *amicus curiae*.

shares.[1] Travco urgently needed new capital as a result of financial difficulties it encountered in the mid-1970's. The Finks voluntarily surrendered some of their shares to Travco in an effort to "increase the attractiveness of the corporation to outside investors." Brief for Respondents 3. Mr. Fink surrendered 116,146 shares in December 1976; Mrs. Fink surrendered 80,000 shares in January 1977. As a result, the Finks' combined percentage ownership of Travco was reduced from 72.5 percent to 68.5 percent. The Finks received no consideration for the surrendered shares, and no other shareholder surrendered any stock. The effort to attract new investors was unsuccessful, and the corporation eventually was liquidated.

On their 1976 and 1977 joint federal income tax returns, the Finks claimed ordinary loss deductions totaling $389,040, the full amount of their adjusted basis in the surrendered shares.[2] The Commissioner of Internal Revenue disallowed the deductions. He concluded that the stock surrendered was a contribution to the corporation's capital. Accordingly, the Commissioner determined that the surrender resulted in no immediate tax consequences, and that the Finks' basis in the surrendered shares should be added to the basis of their remaining shares of Travco stock.

In an unpublished opinion, the Tax Court sustained the Commissioner's determination for the reasons stated in *Frantz* v. *Commissioner*, 83 T. C. 162, 174–182 (1984), aff'd, 784 F. 2d 119 (CA2 1986), cert. pending, No. 86–11. In *Frantz* the Tax Court held that a stockholder's non pro rata surrender of shares to the corporation does not produce an immediate loss. The court reasoned that "[t]his conclusion . . . necessarily follows from a recognition of the purpose of the transfer, that is, to bolster the financial position of [the corporation] and, hence, to protect and make more valuable [the stockholder's] retained shares." 83 T. C., at 181. Because the purpose of the shareholder's surrender is "to decrease or avoid a loss on his overall investment," the Tax Court in *Frantz* was "unable to conclude that [he] sustained a loss at the time of the transaction." *Ibid.* "Whether [the shareholder] would sustain a loss, and if so, the amount thereof, could only be determined when he subsequently disposed of the stock that the surrender was intended to protect and make more valuable." *Ibid.* The Tax Court recognized that it had sustained the taxpayer's position in a series of prior cases.[3] *Id.*, at 174–175. But it concluded that these

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[1] In addition, Mr. Fink's sister owned 10 percent of the stock, his brother-in-law owned 4.1 percent, and his mother owned 2.2 percent. App. to Pet. for Cert. 30a.

[2] The unadjusted basis of shares is their cost. 26 U. S. C. § 1012. Adjustments to basis are made for, among other things, "expenditures, receipts, losses, or other items, properly chargeable to capital account." § 1016(a)(1).

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[3] *E. g.*, *Tilford* v. *Commissioner*, 75 T. C. 134 (1980), rev'd, 705 F. 2d 828 (CA6), cert. denied, 464 U. S. 992 (1983); *Smith* v. *Commissioner*, 66 T. C. 622, 648 (1976), rev'd *sub nom. Schleppy* v. *Commissioner*, 601 F. 2d 196 (CA5 1979); *Downer* v. *Commissioner*, 48 T. C. 86, 91 (1967); *Estate of Foster* v. *Commissioner*, 9 T. C. 930, 934 (1947); *Miller* v. *Commissioner*, 45 B. T. A. 292, 299 (1941); *Budd International Corp.* v. *Commissioner*, 45 B. T. A. 737, 755–756 (1941). The Commissioner acquiesced in *Miller* and *Budd*, but later withdrew his acquiescence. See 1941–2 Cum. Bull. 9; 1942–2 Cum. Bull. 3; 1977–1 Cum. Bull. 2.

The dissent overstates the extent to which the Commissioner's disallowance of ordinary loss deductions is contrary to the "settled construction of law." *Post*, at 105. In fact, the Commissioner's position was uncertain when the Finks surrendered their shares in 1976 and 1977. Although the Commissioner had acquiesced in the Tax Court's holdings that non pro rata surrenders give rise to ordinary losses, "it often took a contrary position in litigation." Note, *Frantz* or *Fink*: Unitary or Fractional View for Non-Prorata Stock Surrenders, 48 U. Pitt. L. Rev. 905, 908 (1987). See, *e. g.*, *Smith* v. *Commissioner*, *supra*, at 647–650; *Duell* v. *Commissioner*, 19 TCM 1381 (1960). In 1969, moreover, the Commissioner clearly took the position that a non pro rata surrender by a majority shareholder is a contribution to capital that does not result in an immediate loss. Rev. Rul. 69–368, 1969–2 Cum. Bull. 27. Thus, the Finks, unlike the taxpayer in *Dickman* v. *Commissioner*, 465 U. S. 330 (1984), knew or should have known that their ordinary loss deductions might not be allowed. For this decisions were incorrect, in part because they "encourage[d] a conversion of eventual capital losses into immediate ordinary losses." *Id.*, at 182.[4]

In this case, a divided panel of the Court of Appeals for the Sixth Circuit reversed the Tax Court. 789 F. 2d 427 (1986). The court concluded that the proper tax treatment of this type of stock surrender turns on the choice between "unitary" and "fragmented" views of stock ownership. Under the "fragmented view," "each share of stock is considered a separate investment," and gain or loss is computed separately on the sale or other disposition of each share. *Id.*, at 429. According to the "unitary view," "the 'stockholder's entire investment is viewed as a single indivisible property unit,'" *ibid.* (citation omitted), and a sale or disposition of some of the stockholder's shares only produces "an ascertainable gain or loss when the stockholder has disposed of his remaining shares." *Id.*, at 432. The court observed that both it and the Tax Court generally had adhered to the fragmented view, and concluded that "the facts of the instant case [do not] present sufficient justification for abandoning" it. *Id.*, at 431. It therefore held that the Finks were entitled to deduct their basis in the surrendered shares immediately as an ordinary loss, except to the extent that the surrender had increased the value of their remaining shares. The Court of Appeals remanded the case to the Tax Court for a determination of the increase, if any, in the value of the Finks' remaining shares that was attributable to the surrender.

Judge Joiner dissented. Because the taxpayers' "sole motivation in disposing of certain shares is to benefit the other shares they hold[.] . . . [v]iewing the surrender of each

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reason, the Commissioner's disallowance of the Finks' deductions was not an abuse of discretion.

[4] The Court of Appeals for the Second Circuit affirmed the Tax Court's holding and agreed with its reasoning. *Frantz* v. *Commissioner*, 784 F. 2d 119, 123–126 (1986), cert. pending, No. 86–11.

share as the termination of an individual investment ignores the very reason for the surrender." *Id.*, at 435. He concluded: "Particularly in cases such as this, where the diminution in the shareholder's corporate control and equity interest is so minute as to be illusory, the stock surrender should be regarded as a contribution to capital." *Ibid.*

We granted certiorari to resolve a conflict among the Circuits,[5] 479 U. S. 960 (1986), and now reverse.

II

A

It is settled that a shareholder's voluntary contribution to the capital of the corporation has no immediate tax consequences. 26 U. S. C. § 263; 26 CFR § 1.263(a)–2(f) (1986). Instead, the shareholder is entitled to increase the basis of his shares by the amount of his basis in the property transferred to the corporation. See 26 U. S. C. § 1016(a)(1). When the shareholder later disposes of his shares, his contribution is reflected as a smaller taxable gain or a larger deductible loss. This rule applies not only to transfers of cash or tangible property, but also to a shareholder's forgiveness of a debt owed to him by the corporation. 26 CFR § 1.61–12(a) (1986). Such transfers are treated as contributions to capital even if the other shareholders make proportionately smaller contributions, or no contribution at all. See, *e. g.*, *Sackstein* v. *Commissioner*, 14 T. C. 566, 569 (1950). The rules governing contributions to capital reflect the general principle that a shareholder may not claim an immediate loss for outlays made to benefit the corporation. *Deputy* v. *Du Pont*, 308 U. S. 488 (1940); *Eskimo Pie Corp.* v. *Commissioner*, 4 T. C. 669, 676 (1945), aff'd, 153 F. 2d 301 (CA3 1946). We must decide whether this principle also applies to a controlling shareholder's non pro rata surrender of a portion of his shares.[6]

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[5] The Courts of Appeals for the Second and Fifth Circuits have held that a dominant shareholder's non pro rata stock surrender does not give rise to an ordinary loss. *Frantz* v. *Commissioner*, *supra*; *Schleppy* v. *Commissioner*, *supra*.

B

The Finks contend that they sustained an immediate loss upon surrendering some of their shares to the corporation. By parting with the shares, they gave up an ownership interest entitling them to future dividends, future capital appreciation, assets in the event of liquidation, and voting rights.[7] Therefore, the Finks contend, they are entitled to an immediate deduction. See 26 U. S. C. §§ 165(a) and (c)(2). In addition, the Finks argue that any non pro rata stock transaction "give[s] rise to immediate tax results." Brief for Respondents 13. For example, a non pro rata stock dividend produces income because it increases the recipient's proportionate ownership of the corporation. *Koshland* v. *Helvering*, 298 U. S. 441, 445 (1936).[8] By analogy, the Finks argue that a non pro rata surrender of shares should be recognized as an immediate loss because it reduces the surrendering shareholder's proportionate ownership.

Finally, the Finks contend that their stock surrenders were not contributions to the corporation's capital. They note that a typical contribution to capital, unlike a non pro rata stock surrender, has no effect on the contributing shareholder's proportionate interest in the corporation. Moreover, the Finks argue, a contribution of cash or other property increases the net worth of the corporation. For example, a shareholder's forgiveness of a debt owed to him by the corporation decreases the corporation's liabilities. In contrast, when a shareholder surrenders shares of the corporation's own stock, the corporation's net worth is unchanged. This is because the corporation cannot itself exercise the right to vote, receive dividends, or receive a share of assets in the event of liquidation. G. Johnson & J. Gentry, Finney and Miller's Principles of Accounting 538 (7th ed. 1974).[9]

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[6] The Finks concede that a pro rata stock surrender, which by definition does not change the percentage ownership of any shareholder, is not a taxable event. Cf. *Eisner* v. *Macomber*, 252 U. S. 189 (1920) (pro rata stock dividend does not produce taxable income).

[7] As a practical matter, however, the Finks did not give up a great deal. Their percentage interest in the corporation declined by only 4 percent. Because the Finks retained a majority interest, this reduction in their voting power was inconsequential. Moreover, Travco, like many corporations in financial difficulties, was not paying dividends.

[8] In most cases, however, stock dividends are not recognized as income until the shares are sold. See 26 U. S. C. § 305.

III

A shareholder who surrenders a portion of his shares to the corporation has parted with an asset, but that alone does not entitle him to an immediate deduction. Indeed, if the shareholder owns less than 100 percent of the corporation's shares, any non pro rata contribution to the corporation's capital will reduce the net worth of the contributing shareholder.[10] A shareholder who surrenders stock thus is similar to one who forgives or surrenders a debt owed to him by the corporation; the latter gives up interest, principal, and also potential voting power in the event of insolvency or bankruptcy. But, as stated above, such forgiveness of corporate debt is treated as a contribution to capital rather than a current deduction. *Supra*, at 94. The Finks' voluntary surrender of shares, like a shareholder's voluntary forgiveness of debt owed by the corporation, closely resembles an investment or contribution to capital. See B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders §3.14, p. 3–59 (4th ed. 1979) ("If the contribution is voluntary, it does not produce gain or loss to the shareholder"). We find the similarity convincing in this case.

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[9] Treasury stock—that is, stock that has been issued, reacquired by the corporation, and not canceled—generally is shown as an offset to the shareholder's equity on the liability side of the balance sheet. G. Johnson & J. Gentry, Finney and Miller's Principles of Accounting 538 (7th ed. 1974).

[10] For example, assume that a shareholder holding an 80 percent interest in a corporation with a total liquidation value of $100,000 makes a non pro rata contribution to the corporation's capital of $20,000 in cash. Assume further that the shareholder has no other assets. Prior to the contribution, the shareholder's net worth was $100,000 ($20,000 plus 80 percent of $100,000). If the corporation were immediately liquidated following the contribution, the shareholder would receive only $96,000 (80 percent of $120,000). Of course such a non pro rata contribution is rare in practice. Typically a shareholder will simply purchase additional shares.

The fact that a stock surrender is not recorded as a contribution to capital on the corporation's balance sheet does not compel a different result. Shareholders who forgive a debt owed by the corporation or pay a corporate expense also are denied an immediate deduction, even though neither of these transactions is a contribution to capital in the accounting sense.[11] Nor are we persuaded by the fact that a stock surrender, unlike a typical contribution to capital, reduces the shareholder's proportionate interest in the corporation. This Court has never held that every change in a shareholder's percentage ownership has immediate tax consequences. Of course, a shareholder's receipt of property from the corporation generally is a taxable event. See 26 U. S. C. §§301, 316. In contrast, a shareholder's transfer of property to the corporation usually has no immediate tax consequences. §263.

The Finks concede that the purpose of their stock surrender was to protect or increase the value of their investment in the corporation. Brief for Respondents 3.[12] They hoped to encourage new investors to provide needed capital and in the long run recover the value of the surrendered shares through increased dividends or appreciation in the value of their remaining shares. If the surrender had achieved its purpose, the Finks would not have suffered an economic loss. See

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[11] It is true that a corporation's stock is not considered an asset of the corporation. A corporation's own shares nevertheless may be as valuable to the corporation as other property contributed by shareholders, as treasury shares may be resold. This is evidenced by the fact that corporations often purchase their own shares on the open market.

[12] Indeed, if the Finks did not make this concession their surrender probably would be treated as a nondeductible gift. See 26 CFR §25.2511–1(h)(1) (1986).

Johnson, Tax Models for Nonprorata Shareholder Contributions, 3 Va. Tax. Rev. 81, 104–108 (1983). In this case, as in many cases involving closely held corporations whose shares are not traded on an open market, there is no reliable method of determining whether the surrender will result in a loss until the shareholder disposes of his remaining shares. Thus, the Finks' stock surrender does not meet the requirement that an immediately deductible loss must be "actually sustained during the taxable year." 26 CFR § 1.165–1(b) (1986).

Finally, treating stock surrenders as ordinary losses might encourage shareholders in failing corporations to convert potential capital losses to ordinary losses by voluntarily surrendering their shares before the corporation fails. In this way shareholders might avoid the consequences of 26 U. S. C. § 165(g)(1), which provides for capital-loss treatment of stock that becomes worthless.[13] Similarly, shareholders may be encouraged to transfer corporate stock rather than other property to the corporation in order to realize a current loss.[14]

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[13] The Tax Reform Act of 1986, Pub. L. 99–514, §§ 301, 311, 100 Stat. 2216, 2219, eliminated the differential tax rates for capital gains and ordinary income. The difference between a capital loss and an ordinary loss remains important, however, because individuals are permitted to deduct only $3,000 of capital losses against ordinary income each year, and corporations may not deduct any capital losses from ordinary income. 26 U. S. C. § 1211. In contrast, ordinary losses generally are deductible from ordinary income without limitation. §§ 165(a) and (c)(2).

The Court of Appeals in this case did not discuss the possibility of allowing a capital loss rather than an ordinary loss, and the parties raise it only in passing. We note, however that a capital loss is realized only upon the "sal[e] or exchang[e]" of a capital asset. 26 U. S. C. § 1211(b)(3). A voluntary surrender, for no consideration, would not seem to qualify as a sale or exchange. *Frantz* v. *Commissioner*, 784 F. 2d, at 124.

[14] Our holding today also draws support from two other sections of the Code. First, § 83 provides that, if a shareholder makes a "bargain sale" of stock to a corporate officer or employee as compensation, the "bargain" element of the sale must be treated as a contribution to the corporation's capital. S. Rep. No. 91–552, pp. 123–124 (1969); 26 CFR § 1.83–6(d)

We therefore hold that a dominant shareholder who voluntarily surrenders a portion of his shares to the corporation, but retains control, does not sustain an immediate loss deductible from taxable income. Rather, the surrendering shareholder must reallocate his basis in the surrendered shares to the shares he retains.[15] The shareholder's loss, if

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(1986). Section 83 reversed the result in *Downer* v. *Commissioner*, 48 T. C. 86 (1967), a decision predicated on the fragmented view of stock ownership adopted by the Court of Appeals in this case. To be sure, Congress was concerned in § 83 with transfers of restricted stock to employees as compensation rather than surrenders of stock to improve the corporation's financial condition. In both cases, however, the shareholder's underlying purpose is to increase the value of his investment.

Second, if a shareholder's stock is redeemed—that is, surrendered to the corporation in return for cash or other property—the shareholder is not entitled to an immediate deduction unless the redemption results in a substantial reduction in the shareholder's ownership percentage. §§ 302 (a), (b), (d); 26 CFR § 1.302-2(c) (1986). Because the Finks' surrenders resulted in only a slight reduction in their ownership percentage, they would not have been entitled to an immediate loss if they had received consideration for the surrendered shares. 26 U. S. C. § 302(b). Although the Finks did not receive a direct payment of cash or other property, they hoped to be compensated by an increase in the value of their remaining shares.

[15] The Finks remained the controlling shareholders after their surrender. We therefore have no occasion to decide in this case whether a surrender that causes the shareholder to lose control of the corporation is immediately deductible. In related contexts, the Code distinguishes between minimal reductions in a shareholder's ownership percentage and loss of corporate control. See § 302(b)(2) (providing "exchange" rather than dividend treatment for a "substantially disproportionate redemption of stock" that brings the shareholder's ownership percentage below 50 percent); § 302(b)(3) (providing similar treatment when the redemption terminates the shareholder's interest in the corporation).

In this case we use the term "control" to mean ownership of more than half of a corporation's voting shares. We recognize, of course, that in larger corporations—especially those whose shares are listed on a national exchange—a person or entity may exercise control in fact while owning less than a majority of the voting shares. See Securities Exchange Act of 1934, § 13(d), 48 Stat. 894, 15 U. S. C. § 78m(d) (requiring persons to report acquisition of more than 5 percent of a registered equity security).

any, will be recognized when he disposes of his remaining shares. A reallocation of basis is consistent with the general principle that "[p]ayments made by a stockholder of a corporation for the purpose of protecting his interest therein must be regarded as [an] additional cost of his stock," and so cannot be deducted immediately. *Eskimo Pie Corp.* v. *Commissioner*, 4 T. C., at 676. Our holding today is not inconsistent with the settled rule that the gain or loss on the sale or disposition of shares of stock equals the difference between the amount realized in the sale or disposition and the shareholder's basis in the particular shares sold or exchanged. See 26 U. S. C. § 1001(a); 26 CFR § 1.1012-1(c)(1) (1986). We conclude only that a controlling shareholder's voluntary surrender of shares, like contributions of other forms of property to the corporation, is not an appropriate occasion for the recognition of gain or loss.

IV

For the reasons we have stated, the judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

JUSTICE BLACKMUN concurs in the result.

JUSTICE WHITE, concurring.

Although I join the Court's opinion, I suggest that there is little substance in the reservation in n. 15 of the question whether a surrender of stock that causes the stockholder to lose control of the corporation is immediately deductible as an ordinary loss. Of course, this case does not involve a loss of control; but as I understand the rationale of the Court's opinion, it would also apply to a surrender that results in loss of control. At least I do not find in the opinion any principled ground for distinguishing a loss-of-control case from this one.

JUSTICE SCALIA, concurring in the judgment.

I do not believe that the Finks' surrender of their shares was, or even closely resembles, a shareholder contribution to corporate capital. Since, however, its purpose was to make the corporation a more valuable investment by giving it a more attractive capital structure, I think that it was, no less than a contribution to capital, an "amount paid out . . . for . . . betterments made to increase the value of . . . property," 26 U. S. C. § 263 (a)(1), and thus not entitled to treatment as a current deduction.

JUSTICE STEVENS, dissenting.

The value of certain and predictable rules of law is often underestimated. Particularly in the field of taxation, there is a strong interest in enabling taxpayers to predict the legal consequences of their proposed actions, and there is an even stronger general interest in ensuring that the responsibility for making changes in settled law rests squarely on the shoulders of Congress. In this case, these interests are of decisive importance for me.

The question of tax law presented by this case was definitively answered by the Board of Tax Appeals in 1941. See *Miller* v. *Commissioner*, 45 B. T. A. 292, 299; *Budd International Corp.* v. *Commissioner*, 45 B. T. A. 737, 755–756.[1] Those decisions were consistently followed for over 40 years, see, *e. g.*, *Smith* v. *Commissioner*, 66 T. C. 622, 648 (1976); *Downer* v. *Commissioner*, 48 T. C. 86, 91 (1967); *Estate of Foster* v. *Commissioner*, 9 T. C. 930, 934 (1947), and the Internal Revenue Service had announced its acquiescence in the decisions. See 1941–2 Cum. Bull. 9 (acquiescing in *Miller*); 1942–2 Cum. Bull. 3 (acquiescing in *Budd International*). Although Congress dramatically revamped the Tax Code in 1954, see Internal Revenue Code of 1954, Pub. L. 83–591, 68A Stat. 3, it did not modify the Tax Court's approach to this issue.

It was only in 1977 (after the Finks had transferred their stock to the corporation), that the Commissioner of Internal Revenue retracted his acquiescence in the Tax Court's interpretation.[2] But instead of asking Congress to reject the longstanding interpretation, the Commissioner asked the courts to take another look at the statute. Two Courts of Appeals accepted the Commissioner's new approach, and reversed the Tax Court without giving much, if any, weight to the Tax Court's nearly half-century-old construction.[3] *Tilford* v. *Commissioner*, 705 F. 2d 828 (CA6 1983); *Schleppy* v. *Commissioner*, 601 F. 2d 196 (CA5 1979). After these two reversals, the Tax Court itself reversed its position in 1984, believing that "[r]ecent appellate level disapproval of the position renders it inappropriate for us to continue to justify the position solely on the basis of its history." *Frantz* v. *Commissioner*, 83 T. C. 162, 174–182 (1984), aff'd, 784 F. 2d 119 (CA2 1986), cert. pending, No. 86–11.

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[1] The principle applied in those decisions dates back even further. See *Burdick* v. *Commissioner*, 20 B. T. A. 742 (1930), aff'd, 59 F. 2d 395 (CA3 1932); *Wright* v. *Commissioner*, 18 B. T. A. 471 (1929).

I believe that these courts erred in reversing the longstanding interpretation of the Tax Code. The Commissioner certainly had a right to advocate a change, but in my opinion he should have requested relief from the body that has the authority to amend the Internal Revenue Code. For I firmly believe that "after a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself." *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 268 (1987) (STEVENS, J., concurring in part and dissenting in part). A rule of statutory construction that "has been consistently recognized for more than 35 years" acquires a clarity that "is simply beyond peradventure." *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 380 (1983).

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[2] The Commissioner appears to have begun reconsidering his position around 1969. See Note, *Frantz* or *Fink:* Unitary or Fractional View for Non-Prorata Stock Surrenders, 48 U. Pitt. L. Rev. 905, 908–909 (1987) (hereafter Note).

[3] Ignoring the import of the long line of Tax Court cases, one court stated: "We find no Court of Appeals decision that determines the correctness of these decisions. We therefore write on a clean sheet." *Schleppy* v. *Commissioner*, 601 F. 2d 196, 198 (CA5 1979).

There may, of course, be situations in which a past error is sufficiently blatant "to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986). But this is surely not such a case.[4] The Court makes no serious effort to demonstrate that its result is compelled by—or even consistent with—the language of the statute.[5] The mere fact that the Court's interpretation of the Internal Revenue Code may be preferable to the view that prevailed for years is not, in my opinion, a sufficient reason for changing the law.

If Congress lacked the power to amend statutes to rectify past mistakes, and if the only value to be achieved in construing statutes were accurate interpretation, it would be clear that a court or agency should feel free at any time to reject a past erroneous interpretation and replace it with the one it believes to be correct. But neither of these propositions is true; Congress does have the ability to rectify misinterpretations, and, once a statute has been consistently interpreted in one way, there are institutional and reliance values that are often even more important than the initial goal of accurate interpretation.

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[4] Strong arguments can be made in support of either view, as the split between the Second and Sixth Circuits and the dissenting opinion of the four Tax Court Judges indicate. See *Frantz* v. *Commissioner*, 83 T. C. 162, 187 (1984) (Parker, J., with whom Fay, Goffe, and Wiles, JJ., joined, dissenting). See also Bolding, Non-Pro Rata Stock Surrenders: Capital Contribution, Capital Loss or Ordinary Loss?, 32 Tax Law. 275 (1979); Note, *supra*. Whether it makes sense to encourage stock surrenders that may enable a sinking corporation to stay afloat in cases like this is at least debatable. But whatever the correct policy choice may be, I would adhere to an interpretation of technical statutory language that has been followed consistently for over 40 years until Congress decides to change the law. Surely that is the wisest course when the language of the statute provides arguable support for the settled rule.

[5] Uncharacteristically, the Court does not begin its analysis by quoting any statutory language, cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring), either from § 165 of the Code, which defines "losses," or from § 1016, which deals with adjustments to basis. Rather, it launches into a discussion of voluntary contributions to capital, see *ante*, at 94–95, even though this was clearly not such a contribution because it had no impact on the net worth of the corporation. The opinion includes a discussion of a hypothetical example, *ante*, at 96, n. 10, and policy reasons supporting the Court's result, but surprisingly little mention of statutory text. The statutory basis for the taxpayer's position is adequately explained in the opinions cited *ante*, at 92–93, n. 3.

The relationship between the courts or agencies, on the one hand, and Congress, on the other, is a dynamic one. In the process of legislating it is inevitable that Congress will leave open spaces in the law that the courts are implicitly authorized to fill. The judicial process of construing statutes must therefore include an exercise of lawmaking power that has been delegated to the courts by the Congress. But after the gap has been filled, regardless of whether it is filled exactly as Congress might have intended or hoped, the purpose of the delegation has been achieved and the responsibility for making any future change should rest on the shoulders of the Congress. Even if it is a consensus of lower federal-court decisions, rather than a decision by this Court, that has provided the answer to a question left open or ambiguous in the original text of the statute, there is really no need for this Court to revisit the issue. Moreover, if Congress understands that as long as a statute is interpreted in a consistent manner, it will not be reexamined by the courts except in the most extraordinary circumstances, Congress will be encouraged to give close scrutiny to judicial interpretations of its work product. We should structure our principles of statutory construction to invite continuing congressional oversight of the interpretive process.[6]

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[6] "The doctrine of *stare decisis* has a more limited application when the precedent rests on constitutional grounds, because 'correction through legislative action is practically impossible.' *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 407–408 (Brandeis, J., dissenting). See *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 627 (POWELL, J., concurring)." *Thomas*

Our readiness to reconsider long-settled constructions of statutes takes its toll on the courts as well. Except in the rarest of cases, I believe we should routinely follow Justice Cardozo's admonition:

> "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, The Nature of the Judicial Process 149 (1921).

In addition to the institutional ramifications of rejecting settled constructions of law, fairness requires consideration of the effect that changes have on individuals' reasonable reliance on a previous interpretation. This case dramatically illustrates the problem. Mr. Fink surrendered his shares in December 1976. Mrs. Fink surrendered hers in January 1977. At that time the law was well settled: the Tax Court had repeatedly reaffirmed the right to deduct such surrenders as ordinary losses, and the Commissioner had acquiesced in this view for 35 years.[7] See *supra*, at 101. It was only on April 11, 1977, that the Commissioner announced his non-

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v. *Washington Gas Light Co.*, 448 U. S. 261, 272–273, n. 18 (1980) (plurality opinion).

See also *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974); *Boys Markets* v. *Retail Clerks*, 398 U. S. 235, 259–260 (1970) (Black, J., dissenting); *Swift & Co.* v. *Wickham*, 382 U. S. 111, 133–134 (1965) (Douglas, J., dissenting).

[7] The Internal Revenue Service's Cumulative Bulletin explains the effect of an announcement of acquiescence:

"In order that taxpayers and the general public may be informed whether the Commissioner has acquiesced in a decision of the Tax Court of the United States, formerly known as the United States Board of Tax Appeals, disallowing a deficiency in tax determined by the Commissoner to be due, announcement will be made in the semimonthly Internal Revenue Bulletin at the earliest practicable date. Notice that the Commissioner has acquiesced or nonacquiesced in a decision of the Tax Court relates only to the issue or issues decided adversely to the Government. *Decisions so acquiesced in should be relied upon by officers and employees of the Bureau of Internal Revenue as precedents in the disposition of other cases.*" 1942–2 Cum. Bull. IV (emphasis added).

acquiescence. See Internal Revenue Bulletin No. 1977–15, p. 6 (April 11, 1977). "In my view, retroactive application of the Court's holding in cases such as this is so fundamentally unfair that it would constitute an abuse of the Commissioner's discretion." *Dickman* v. *Commissioner*, 465 U. S. 330, 353, n. 11 (1984) (POWELL, J., dissenting).

I respectfully dissent.

TANNER ET AL. v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-177. Argued March 31, 1987—Decided June 22, 1987

Seminole Electric Cooperative, Inc. (Seminole), obtained a bank loan for a power plant construction project which included an access road. The loan was guaranteed by the federal Rural Electrification Administration (REA) which had the right to supervise the project, to approve certain contracts including the road construction agreement, and to require certain bidding procedures to be used. Petitioner Conover, Seminole's procurement manager, and petitioner Tanner were friends and had engaged in several business deals together. At about the time the contracts for construction of the road and for fill materials were awarded to Tanner's company upon favorable bidding specifications prepared by Conover's procurement department, Tanner paid Conover over $30,000, allegedly as payments on their personal transactions. Thereafter, Conover helped resolve problems between Seminole and Tanner on terms favorable to Tanner, and, after the REA complained that Tanner's bond was not from an approved company, Conover sent letters to a new bonding company that misrepresented the road's state of completion. On these facts, petitioners were indicted and convicted of conspiring to defraud the United States in violation of 18 U. S. C. § 371, and of committing mail fraud in violation of 18 U. S. C. § 1341. Before they were sentenced, petitioners filed a motion seeking permission to interview jurors, an evidentiary hearing, and a new trial based on a trial juror's statement that several jurors had consumed alcohol at lunch throughout the trial, causing them to sleep during the afternoons. The District Court concluded that juror testimony on intoxication was inadmissible under Federal Rule of Evidence 606(b) to impeach the jury's verdict, but invited petitioners to call nonjuror witnesses in support of their motion. The only such evidence introduced was defense counsel's testimony that he had observed one of the jurors "in a sort of giggly mood" at trial but did not bring this to anyone's attention at that time. The judge pointed out that, although he had discussed with counsel during the trial the possibility that jurors were falling asleep, neither counsel nor courtroom employees had thereafter alerted him to such a problem, and he had observed none himself. Thus, he denied the motion and subsequently denied a similar motion based on another juror's affidavit which alleged widespread juror use of alcohol and drugs during the trial, but which admitted that none of the jurors with whom the affiant drank were intoxicated and that his own reasoning ability was affected only one time. The Court of Appeals affirmed petitioners' convictions, holding that their actions constituted a conspiracy to defraud the United States under § 371, and that this conspiracy was sufficient to establish a § 1341 violation. Thus, the court did not reach the question whether the evidence established the use of the mails for the purpose of defrauding Seminole.

Held:

1. The District Court did not err in refusing to hold an evidentiary hearing at which jurors would testify on juror alcohol and drug use during the trial. Pp. 116–127.

(a) Such testimony is barred by Rule 606(b), which embodies the long-accepted common-law and federal rule on the subject, and which prohibits the impeachment of a verdict with a juror's testimony "as to . . . the effect of anything upon his or any juror's mind or emotions . . . , except that [such testimony is admissible on the question] whether any outside influence was improperly brought to bear on any juror." This Rule is supported by substantial policy considerations, including the need to assure full and frank discussion in the privacy of the jury room, to prevent the harassment of jurors by losing parties, and to preserve the community's trust in a system that relies on the decisions of laypeople. Petitioners' argument that substance abuse constitutes an improper "outside influence" about which jurors may testify under the Rule is without merit in light of contrary judicial interpretation of the common-law rule, as well as Rule 606(b)'s plain language and legislative history. Even if the Rule is interpreted to retain a common-law exception allowing postverdict inquiry into juror incompetence in cases of "substantial if not wholly conclusive evidence of incompetency," the record here falls far short of the extremely strong showing of incompetency that the exception requires. Pp. 116–126.

(b) An evidentiary hearing including juror testimony on drug and alcohol use was not required under petitioners' Sixth Amendment right to trial by a competent and unimpaired jury. That right is adequately protected by several aspects of the trial process, including *voir dire*, the fact that the preverdict conduct of jurors is observable by the court, by counsel, by court personnel, and by other jurors, and by the fact that, as here, the trial court may allow a post-trial evidentiary hearing to impeach the verdict by nonjuror evidence of juror misconduct. Pp. 126–127.

2. To the extent the evidence established a conspiracy by petitioners to defraud Seminole, their actions did not violate § 371, which prohibits conspiracies "to defraud the United States, or any agency thereof." The Government's argument that Seminole, as the recipient of federal financial assistance, and the subject of federal supervision, must be

treated as "the United States" under § 371 is untenable, in light of the statute's plain and unambiguous language and the Government's concession that Seminole is not an "agency" thereunder, and in the absence of any indication in the legislative history that § 371 should be expanded to cover conspiracies to defraud those acting on behalf of the United States. Given the immense variety of federal assistance arrangements, the Government's suggested requirement that there be "substantial ongoing federal supervision" of the defrauded nongovernmental intermediary before a crime against the United States occurs fails to provide any real guidance. However, to the extent that the evidence was sufficient to establish that petitioners conspired to cause Seminole to make misrepresentations to the REA, petitioners' § 371 convictions may stand. On remand, the Court of Appeals must consider the sufficiency of the evidence on this charge. Pp. 128–132.

3. If, on remand, the premise on which the Court of Appeals based its affirmance of the mail fraud convictions under § 1341—that petitioners' actions constituted a conspiracy to defraud the United States under § 371—is rejected, that court must consider whether the evidence established a scheme to defraud Seminole through the use of the mails. Pp. 133–134.

772 F. 2d 765, affirmed in part and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court with respect to Parts III and IV and the opinion of the Court with respect to Parts I and II, in which REHNQUIST, C. J., and WHITE, POWELL, and SCALIA, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 134.

John A. DeVault III argued the cause for petitioners. With him on the briefs were *Timothy J. Corrigan* and *David R. Best*.

Richard J. Lazarus argued the cause for the United States. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Weld*, *Deputy Solicitor General Bryson*, and *Gloria C. Phares*.

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioners William Conover and Anthony Tanner were convicted of conspiring to defraud the United States in violation of 18 U. S. C. § 371, and of committing mail fraud in violation of 18 U. S. C. § 1341. The United States Court of Appeals for the Eleventh Circuit affirmed the convictions. 772 F. 2d 765 (1985). Petitioners argue that the District Court erred in refusing to admit juror testimony at a post-verdict hearing on juror intoxication during the trial; and that the conspiracy count of the indictment failed to charge a crime against the United States. We affirm in part and remand.

I

Conover was the procurement manager at Seminole Electric Cooperative, Inc. (Seminole), a Florida corporation owned and operated by 11 rural electric distribution cooperatives. Seminole generates and transmits electrical energy to the cooperatives.

In 1979, Seminole borrowed over $1.1 billion from the Federal Financing Bank in order to construct a coal-fired power plant near Palatka, Florida. The loan was guaranteed by the Rural Electrification Administration (REA), a credit agency of the United States Department of Agriculture that assists rural electric organizations by providing loans, guaranteeing loans from other sources, and approving other security arrangements that allow the borrower to obtain financing. REA, A Brief History of the Rural Electrification and Telephone Programs (1985). The loan agreement between Seminole and the REA provided for federal supervision of the construction project. Under the contract, the REA could supervise the construction and equipment of the electric system, and inspect, examine, and test all work and materials relating to the construction project. App. 61–62. REA Bulletins and REA memoranda required Seminole to obtain REA approval before letting out certain contracts, and required certain bidding procedures to be used depending on the type of contract. *Id.*, at 83, 105–108.

Construction of the Palatka plant began in September 1979. To provide access to an area where a transmission line would be run, the plans called for the construction of a 51-

mile patrol road. The road required materials that would support heavy trucks and resist flooding, and in March 1981, Conover was informed that Seminole's current construction contractor was having difficulty obtaining enough suitable fill material for the road. The contractor indicated that it had not attempted to locate alternative fill materials, and that the contract price would have to be increased substantially in order for them to complete the road. The contract was subsequently terminated.

Following the March meeting at which Conover was informed of the difficulty with the patrol road, Conover called a friend, Anthony R. Tanner. Tanner owned a limerock mine, and the two discussed the possibility of using limerock and limerock overburden as an alternative fill material. At Conover's request, a Seminole engineer examined the material at Tanner's mine and determined that it would be suitable for the road. Seminole acquired limerock overburden from Tanner on an interim basis so that road construction could continue while bids were solicited for the remainder of the project. Seminole called for bids on a contract for provision of fill materials as well as a contract for building the road. Both contracts were to be paid with loan money guaranteed by the REA, and the contract for building the road required the REA's approval. The final specifications for the two contracts, which were prepared by Conover's procurement department, were favorable to Tanner's company in several respects. Tanner was awarded both contracts on May 14, 1981. The fill material contract paid approximately $1,041,800, and the road construction contract paid approximately $548,000. App. 10.

Several problems developed after Tanner began working on the road. There was a dispute as to whether Seminole or Tanner was required to maintain access roads leading to the patrol road. Conover advised Seminole that the contract was ambiguous and that Seminole should pay for maintenance of the access road; ultimately Seminole did pay for the access road. Later, the REA complained that the bond provided by Tanner was not from a bonding company approved by the Treasury Department. In two letters to another bonding company in July 1981, Conover represented the construction on the patrol road to be considerably more advanced than it was at that time. It was also discovered during the course of construction that limerock, which weakens when wet, could not be used in areas subject to flooding. For those areas Tanner's company provided and spread sand, at a higher price than the sand provided and spread by the first contractor. The patrol road was completed in October 1981.

At the time Conover called Tanner about using limerock as a fill material for Seminole's patrol road, Tanner and Conover were friends and had engaged in several business deals together. In January 1981 Conover had obtained a contract from Tanner to perform landscaping work and install a sprinkler system at a condominium complex owned by Tanner. In early March 1981, Tanner paid Conover $10,035, allegedly in partial payment for the landscaping work; eventually Conover received a total of $15,000 for the work. In May 1981 Conover purchased a condominium from Tanner, and Tanner loaned Conover $6,000 so that Conover could close on the condominium.

In June 1981, before the patrol road was finished, representatives of one of the members of the Seminole cooperative requested that Seminole end all business relations with Tanner. Seminole initiated an internal investigation, after which Seminole suspended and later demoted Conover for violation of the company's conflict of interest policies.

Federal authorities also investigated the situation, and in June 1983 Conover and Tanner were indicted. A 6-week trial resulted in a hung jury and a mistrial was declared. The two were subsequently reindicted; the first count alleged conspiracy to defraud the United States in violation of 18 U. S. C. § 371, and the second through fifth counts alleged separate instances of mail fraud in violation of 18 U. S. C. § 1341. Conover was convicted on all counts; Tanner was convicted on all but count three.

The day before petitioners were scheduled to be sentenced, Tanner filed a motion, in which Conover subsequently joined, seeking continuance of the sentencing date, permission to interview jurors, an evidentiary hearing, and a new trial. According to an affidavit accompanying the motion, Tanner's attorney had received an unsolicited telephone call from one of the trial jurors, Vera Asbul. App. 246. Juror Asbul informed Tanner's attorney that several of the jurors consumed alcohol during the lunch breaks at various times throughout the trial, causing them to sleep through the afternoons. *Id.*, at 247. The District Court continued the sentencing date, ordered the parties to file memoranda, and heard argument on the motion to interview jurors. The District Court concluded that juror testimony on intoxication was inadmissible under Federal Rule of Evidence 606(b) to impeach the jury's verdict. The District Court invited petitioners to call any nonjuror witnesses, such as courtroom personnel, in support of the motion for new trial. Tanner's counsel took the stand and testified that he had observed one of the jurors "in a sort of giggly mood" at one point during the trial but did not bring this to anyone's attention at the time. *Id.*, at 170.

Earlier in the hearing the judge referred to a conversation between defense counsel and the judge during the trial on the possibility that jurors were sometimes falling asleep. During that extended exchange the judge twice advised counsel to immediately inform the court if they observed jurors being inattentive, and suggested measures the judge would take if he were so informed:

> "MR. MILBRATH [defense counsel]: But, in any event, I've noticed over a period of several days that a couple of jurors in particular have been taking long naps during the trial.

> "THE COURT: Is that right. Maybe I didn't notice because I was ——
>
> "MR. MILBRATH: I imagine the Prosecutors have noticed that a time or two.
>
> "THE COURT: What's your solution?
>
> "MR. MILBRATH: Well, I just think a respectful comment from the Court that if any of them are getting drowsy, they just ask for a break or something might be helpful.
>
> "THE COURT: Well, here's what I have done in the past—and, you have to do it very diplomatically, of course: I once said, I remember, 'I think we'll just let everybody stand up and stretch, it's getting a little sleepy in here,' I said, but that doesn't sound good in the record.
>
> "I'm going to—not going to take on that responsibility. If any of you think you see that happening, ask for a bench conference and come up and tell me about it and I'll figure out what to do about it, and I won't mention who suggested it.
>
> "MR. MILBRATH: All right.
>
> "THE COURT: But, I'm not going to sit here and watch. I'm—among other things, I'm not going to see—this is off the record.
>
> "(Discussion had off the record.)
>
> ". . . [T]his is a new thing to this jury, and I don't know how interesting it is to them or not; some of them look like they're pretty interested.
>
> . . . . .
>
> "And, as I say, if you don't think they are, come up and let me know and I'll figure how—either have a recess or—which is more than likely what I would do." Tr. 12-100-12-101.

As the judge observed during the hearing, despite the above admonitions counsel did not bring the matter to the court again. App. 147.

The judge also observed that in the past courtroom employees had alerted him to problems with the jury. "Nothing was brought to my attention in this case about anyone appearing to be intoxicated," the judge stated, adding, "I saw nothing that suggested they were." *Id.*, at 172.

Following the hearing the District Court filed an order stating that "[o]n the basis of the admissible evidence offered I specifically find that the motions for leave to interview jurors or for an evidentiary hearing at which jurors would be witnesses is not required or appropriate." The District Court also denied the motion for new trial. *Id.*, at 181–182.

While the appeal of this case was pending before the Eleventh Circuit, petitioners filed another new trial motion based on additional evidence of jury misconduct. In another affidavit, Tanner's attorney stated that he received an unsolicited visit at his residence from a second juror, Daniel Hardy. *Id.*, at 241. Despite the fact that the District Court had denied petitioners' motion for leave to interview jurors, two days after Hardy's visit Tanner's attorney arranged for Hardy to be interviewed by two private investigators. *Id.*, at 242. The interview was transcribed, sworn to by the juror, and attached to the new trial motion. In the interview Hardy stated that he "felt like . . . the jury was on one big party." *Id.*, at 209. Hardy indicated that seven of the jurors drank alcohol during the noon recess. Four jurors, including Hardy, consumed between them "a pitcher to three pitchers" of beer during various recesses. *Id.*, at 212. Of the three other jurors who were alleged to have consumed alcohol, Hardy stated that on several occasions he observed two jurors having one or two mixed drinks during the lunch recess, and one other juror, who was also the foreperson, having a liter of wine on each of three occasions. *Id.*, at 213–215. Juror Hardy also stated that he and three other jurors smoked marijuana quite regularly during the trial. *Id.*, at 216–223. Moreover, Hardy stated that during the trial he observed one juror ingest cocaine five times and another juror ingest cocaine two or three times. *Id.*, at 227. One juror sold a quarter pound of marijuana to another juror during the trial, and took marijuana, cocaine, and drug paraphernalia into the courthouse. *Id.*, at 234–235. Hardy noted that some of the jurors were falling asleep during the trial, and that one of the jurors described himself to Hardy as "flying." *Id.*, at 229. Hardy stated that before he visited Tanner's attorney at his residence, no one had contacted him concerning the jury's conduct, and Hardy had not been offered anything in return for his statement. *Id.*, at 232. Hardy said that he came forward "to clear my conscience" and "[b]ecause I felt . . . that the people on the jury didn't have no business being on the jury. I felt . . . that Mr. Tanner should have a better opportunity to get somebody that would review the facts right." *Id.*, at 231–232.

The District Court, stating that the motions "contain supplemental allegations which differ quantitatively but not qualitatively from those in the April motions," *id.*, at 256, denied petitioners' motion for a new trial.

The Court of Appeals for the Eleventh Circuit affirmed. 772 F. 2d 765 (1985). We granted certiorari, 479 U. S. 929 (1986), to consider whether the District Court was required to hold an evidentiary hearing, including juror testimony, on juror alcohol and drug use during the trial, and to consider whether petitioners' actions constituted a conspiracy to defraud the United States within the meaning of 18 U. S. C. § 371.

II

Petitioners argue that the District Court erred in not ordering an additional evidentiary hearing at which jurors would testify concerning drug and alcohol use during the trial. Petitioners assert that, contrary to the holdings of the District Court and the Court of Appeals, juror testimony on ingestion of drugs or alcohol during the trial is not barred by Federal Rule of Evidence 606(b). Moreover, petitioners argue that whether or not authorized by Rule 606(b), an evidentiary hearing including juror testimony on drug and alcohol use is compelled by their Sixth Amendment right to trial by a competent jury.

By the beginning of this century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict. See 8 J. Wigmore, Evidence § 2352, pp. 696–697 (J. McNaughton rev. ed. 1961) (common-law rule, originating from 1785 opinion of Lord Mansfield, "came to receive in the United States an adherence almost unquestioned").

Exceptions to the common-law rule were recognized only in situations in which an "extraneous influence," *Mattox* v. *United States*, 146 U. S. 140, 149 (1892), was alleged to have affected the jury. In *Mattox*, this Court held admissible the testimony of jurors describing how they heard and read prejudicial information not admitted into evidence. The Court allowed juror testimony on influence by outsiders in *Parker* v. *Gladden*, 385 U. S. 363, 365 (1966) (bailiff's comments on defendant), and *Remmer* v. *United States*, 347 U. S. 227, 228–230 (1954) (bribe offered to juror). See also *Smith* v. *Phillips*, 455 U. S. 209 (1982) (juror in criminal trial had submitted an application for employment at the District Attorney's office). In situations that did not fall into this exception for external influence, however, the Court adhered to the common-law rule against admitting juror testimony to impeach a verdict. *McDonald* v. *Pless*, 238 U. S. 264 (1915); *Hyde* v. *United States*, 225 U. S. 347, 384 (1912).

Lower courts used this external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible. The distinction was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation. Clearly a rigid distinction based only on whether the event took place inside or outside the jury room would have been quite unhelpful. For example, under a distinction based on location a juror could not testify concerning a newspaper read inside the jury room. Instead, of course, this has been considered an external influence about which juror testimony is admissible. See *United States* v. *Thomas*, 463 F. 2d 1061 (CA7 1972). Similarly, under a rigid locational distinction jurors could be regularly required to testify after the verdict as to whether they heard and comprehended the judge's instructions, since the charge to the jury takes place outside the jury room. Courts wisely have treated allegations of a juror's inability to hear or comprehend at trial as an internal matter. See *Government of the Virgin Islands* v. *Nicholas*, 759 F. 2d 1073 (CA3 1985); *Davis* v. *United States*, 47 F. 2d 1071 (CA5 1931) (rejecting juror testimony impeaching verdict, including testimony that jurors had not heard a particular instruction of the court).

Most significant for the present case, however, is the fact that lower federal courts treated allegations of the physical or mental incompetence of a juror as "internal" rather than "external" matters. In *United States* v. *Dioguardi*, 492 F. 2d 70 (CA2 1974), the defendant Dioguardi received a letter from one of the jurors soon after the trial in which the juror explained that she had "eyes and ears that . . . see things before [they] happen," but that her eyes "are only partly open" because "a curse was put upon them some years ago." *Id.*, at 75. Armed with this letter and the opinions of seven psychiatrists that the letter suggested that the juror was suffering from a psychological disorder, Dioguardi sought a new trial or in the alternative an evidentiary hearing on the juror's competence. The District Court denied the motion and the Court of Appeals affirmed. The Court of Appeals noted "[t]he strong policy against any post-verdict inquiry into a juror's state of mind," *id.*, at 79, and observed:

> "The quickness with which jury findings will be set aside when there is proof of tampering or *external* influence, . . . parallel the reluctance of courts to inquire into jury

> deliberations when a verdict is valid on its face. . . . Such exceptions support rather than undermine the rationale of the rule that possible *internal* abnormalities in a jury will not be inquired into except 'in the gravest and most important cases.'" *Id.*, at 79, n. 12, quoting *McDonald* v. *Pless*, *supra*, at 269 (emphasis in original).

The Court of Appeals concluded that when faced with allegations that a juror was mentally incompetent, "courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance . . . of jury service," or proof of "a closely contemporaneous and independent post-trial adjudication of incompetency." 492 F. 2d, at 80. See also *Sullivan* v. *Fogg*, 613 F. 2d 465, 467 (CA2 1980) (allegation of juror insanity is internal consideration); *United States* v. *Allen*, 588 F. 2d 1100, 1106, n. 12 (CA5 1979) (noting "specific reluctance to probe the minds of jurors once they have deliberated their verdict"); *United States* v. *Pellegrini*, 441 F. Supp. 1367 (ED Pa. 1977), aff'd, 586 F. 2d 836 (CA3), cert. denied, 439 U. S. 1050 (1978) (whether juror sufficiently understood English language was not a question of "extraneous influence"). This line of federal decisions was reviewed in *Government of the Virgin Islands* v. *Nicholas*, *supra*, in which the Court of Appeals concluded that a juror's allegation that a hearing impairment interfered with his understanding of the evidence at trial was not a matter of "external influence." *Id.*, at 1079.

Substantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict. As early as 1915 this Court explained the necessity of shielding jury deliberations from public scrutiny:

> "[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering some-

> thing which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, 238 U. S., at 267–268.

See also *Mattox* v. *United States*, 146 U. S. 140 (1892).

The Court's holdings requiring an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations do not detract from, but rather harmonize with, the weighty government interest in insulating the jury's deliberative process. See *Smith* v. *Phillips*, 455 U. S. 209 (1982) (juror in criminal trial had submitted an application for employment at the District Attorney's office); *Remmer* v. *United States*, 347 U. S. 227 (1954) (juror reported attempted bribe during trial and was subjected to investigation). The Court's statement in *Remmer* that "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions," *id.*, at 229, could also be applied to the inquiry petitioners seek to make into the internal processes of the jury.

There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. See, *e. g.*, *Government of the Virgin Islands* v. *Nicholas*, *supra*, at 1081 (one year and eight months after verdict rendered, juror alleged that hearing difficulties affected his understanding of the evidence). Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct. See Note, Public Disclosures of Jury Deliberations, 96 Harv. L. Rev. 886, 888–892 (1983).

Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences. See *Government of the Virgin Islands* v. *Gereau*, 523 F. 2d 140, 149, n. 22 (CA3 1975); S. Rep. No. 93–1277, p. 13 (1974) (observing that Rule 606(b) "embodied long-accepted Federal law").

Rule 606(b) states:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

Petitioners have presented no argument that Rule 606(b) is inapplicable to the juror affidavits and the further inquiry they sought in this case, and, in fact, there appears to be virtually no support for such a proposition. See 3 D. Louisell & C. Mueller, Federal Evidence §287, pp. 121–125 (1979) (under Rule 606(b), "proof to the following effects is excludable . . . : . . . that one or more jurors was inattentive during trial or deliberations, sleeping or thinking about other matters"); cf. Note, Impeachment of Verdicts by Jurors—Rule of Evidence 606(b), 4 Wm. Mitchell L. Rev. 417, 430–431, and n. 88 (1978) (observing that under Rule 606(b), "juror testimony as to . . . juror intoxication probably will be inadmissible"; note author suggests that "[o]ne possibility is for the courts to determine that certain acts, such as a juror becoming intoxicated outside the jury room, simply are not within the rule," but cites no authority in support of the suggestion). Rather, petitioners argue that substance abuse constitutes an improper "outside influence" about which jurors may testify under Rule 606(b). In our view the language of the Rule cannot easily be stretched to cover this circumstance. However severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an "outside influence" than a virus, poorly prepared food, or a lack of sleep.

In any case, whatever ambiguity might linger in the language of Rule 606(b) as applied to juror intoxication is resolved by the legislative history of the Rule. In 1972, following criticism of a proposed rule that would have allowed considerably broader use of juror testimony to impeach verdicts, the Advisory Committee drafted the present version of Rule 606(b). Compare 51 F. R. D. 315, 387 (1971) with 56 F. R. D. 183, 265 (1972); see 117 Cong. Rec. 33642, 33645 (1971) (letter from Sen. McClellan to Advisory Committee criticizing earlier proposal); *id.*, at 33655 (letter from Department of Justice to Advisory Committee criticizing earlier proposal and arguing that "[s]trong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations"). This Court adopted the present version of Rule 606(b) and transmitted it to Congress.

The House Judiciary Committee described the effect of the version of Rule 606(b) transmitted by the Court as follows:

> "As proposed by the Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the

> influence of extraneous prejudicial information brought to the jury's attention (e. g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e. g. a threat to the safety of a member of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of juror, *nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.*" H. R. Rep. No. 93–650, pp. 9–10 (1973) (emphasis supplied).

The House Judiciary Committee, persuaded that the better practice was to allow juror testimony on any "objective juror misconduct," amended the Rule so as to comport with the more expansive versions proposed by the Advisory Committee in earlier drafts,* and the House passed this amended version.

The Senate Judiciary Committee did not voice any disagreement with the House's interpretation of the Rule proposed by the Court, or the version passed by the House. Indeed, the Senate Report described the House version as "considerably broader" than the version proposed by the Court, and noted that the House version "would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room." S. Rep. No. 93–1277, p. 13 (1974). With this understanding of the differences between the two versions of Rule 606(b)—an understanding identical to that of the House—the Senate decided to reject the broader House version and adopt the narrower version approved by the Court. The Senate Report explained:

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*The House version, which adopted the earlier Advisory Committee proposal, read as follows:

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes." H. R. 5463, 93d Cong., 2d Sess. (1974).

> "[The House version's] extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.
>
> "The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodied long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony 'as to any matter or statement occurring during the course of the jury's deliberations.' This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.
>
> "Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court.
>
> . . . . .
>
> "As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.
>
> "Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the in-

> terest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors." *Id.*, at 13–14.

The Conference Committee Report reaffirms Congress' understanding of the differences between the House and Senate versions of Rule 606(b): "[T]he House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations." H. R. Conf. Rep. No. 93–1597, p. 8 (1974). The Conference Committee adopted, and Congress enacted, the Senate version of Rule 606(b).

Thus, the legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations, including juror intoxication. This legislative history provides strong support for the most reasonable reading of the language of Rule 606(b)—that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict.

Finally, even if Rule 606(b) is interpreted to retain the common-law exception allowing postverdict inquiry of juror incompetence in cases of "substantial if not wholly conclusive evidence of incompetency," *Dioguardi*, 492 F. 2d, at 80, the showing made by petitioners falls far short of this standard. The affidavits and testimony presented in support of the first new trial motion suggested, at worst, that several of the jurors fell asleep at times during the afternoons. The District Court Judge appropriately considered the fact that he had "an unobstructed view" of the jury, and did not see any juror sleeping. App. 147–149, 167–168; see *Government of the Virgin Islands* v. *Nicholas*, 759 F. 2d, at 1077 ("[I]t was appropriate for the trial judge to draw upon his personal knowledge and recollection in considering the factual allegations . . . that related to events that occurred in his presence"). The juror affidavit submitted in support of the second new trial motion was obtained in clear violation of the District Court's order and the court's local rule against juror interviews, MD Fla. Rule 2.04(c); on this basis alone the District Court would have been acting within its discretion in disregarding the affidavit. In any case, although the affidavit of juror Hardy describes more dramatic instances of misconduct, Hardy's allegations of *incompetence* are meager. Hardy stated that the alcohol consumption he engaged in with three other jurors did not leave any of them intoxicated. App. to Pet. for Cert. 47 ("I told [the prosecutor] that we would just go out and get us a pitcher of beer and drink it, but as far as us being drunk, no we wasn't"). The only allegations concerning the jurors' ability to properly consider the evidence were Hardy's observations that some jurors were "falling asleep all the time during the trial," and that his own reasoning ability was affected on one day of the trial. App. to Pet. for Cert. 46, 55. These allegations would not suffice to bring this case under the common-law exception allowing postverdict inquiry when an extremely strong showing of incompetency has been made.

Petitioners also argue that the refusal to hold an additional evidentiary hearing at which jurors would testify as to their conduct "violates the sixth amendment's guarantee to a fair trial before an impartial and *competent* jury." Brief for Petitioners 34 (emphasis in original).

This Court has recognized that a defendant has a right to "a tribunal both impartial and mentally competent to afford a hearing." *Jordan* v. *Massachusetts*, 225 U. S. 167, 176 (1912). In this case the District Court held an evidentiary hearing in response to petitioners' first new trial motion at which the judge invited petitioners to introduce any admissible evidence in support of their allegations. At issue in this case is whether the Constitution compelled the District

Court to hold an additional evidentiary hearing including one particular kind of evidence inadmissible under the Federal Rules.

As described above, long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry. Petitioners' Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire.* Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel. See *United States* v. *Provenzano*, 620 F. 2d 985, 996–997 (CA3 1980) (marshal discovered sequestered juror smoking marijuana during early morning hours). Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict. See *Lee* v. *United States*, 454 A. 2d 770 (DC App. 1982), cert. denied *sub nom. McIlwain* v. *United States*, 464 U. S. 972 (1983) (on second day of deliberations, jurors sent judge a note suggesting that foreperson was incapacitated). Finally, after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct. See *United States* v. *Taliaferro*, 558 F. 2d 724, 725–726 (CA4 1977) (court considered records of club where jurors dined, and testimony of marshal who accompanied jurors, to determine whether jurors were intoxicated during deliberations). Indeed, in this case the District Court held an evidentiary hearing giving petitioners ample opportunity to produce nonjuror evidence supporting their allegations.

In light of these other sources of protection of petitioners' right to a competent jury, we conclude that the District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the nonjuror evidence offered by petitioners, that an additional postverdict evidentiary hearing was unnecessary.

III

Title 18 U. S. C. § 371 provides, in relevant part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Section 371 is the descendent of and bears a strong resemblance to conspiracy laws that have been in the federal statute books since 1867. See Act of Mar. 2, 1867, ch. 169, § 30, 14 Stat. 484 (prohibiting conspiracy to "defraud the United States in any manner whatever"). Neither the original 1867 provision nor its subsequent reincarnations were accompanied by any particularly illuminating legislative history. This case has been preceded, however, by decisions of this Court interpreting the scope of the phrase "to defraud . . . in any manner or for any purpose." In those cases we have stated repeatedly that the fraud covered by the statute "reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'" *Dennis* v. *United States*, 384 U. S. 855, 861 (1966), quoting *Haas* v. *Henkel*, 216 U. S. 462, 479 (1910); see also *Glasser* v. *United States*, 315 U. S. 60, 66 (1942); *Hammerschmidt* v. *United States*, 265 U. S. 182, 188 (1924). We do not reconsider that aspect of the scope of § 371 in this case. Therefore, if petitioners' actions constituted a conspiracy to impair the functioning of the REA, no other form of injury to the Federal Government need be established for the conspiracy to fall under § 371.

The indictment against petitioners charged them with having conspired "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Rural Electrification Administration in its administration and enforcement of its guaranteed loan program." App. 5. Petitioners argue that if the evidence adduced at trial established a conspiracy to defraud, then the target of that conspiracy was Seminole Electric, and a conspiracy to defraud a private corporation receiving financial assistance from the Federal Government does not constitute a conspiracy to defraud the United States.

The Government sets out two arguments in response to petitioners' challenge to the § 371 convictions. The first, which we accept, is that a conspiracy to defraud the United States may be effected by the use of third parties. The Government's second argument asserts that Seminole, as the recipient of federal financial assistance and the subject of federal supervision, may itself be treated as "the United States" for purposes of § 371. This second argument must be rejected.

The Government observes, correctly, that under the common law a fraud may be established when the defendant has made use of a third party to reach the target of the fraud. 2 H. Brill, Cyclopedia of Criminal Law § 1244, p. 1892 (1923). The Government also correctly observes that the broad language of § 371, covering conspiracies to defraud "in any manner for any purpose," puts no limits based on the *method* used to defraud the United States. A method that makes uses of innocent individuals or businesses to reach and defraud the United States is not for that reason beyond the scope of § 371. In two cases interpreting the False Claims Act, which reaches "[e]very person who makes or causes to be made, or presents or causes to be presented" a false claim against the United States, Rev. Stat. § 5438, we recognized that the fact that a false claim passes through the hands of a third party on its way from the claimant to the United States does not release the claimant from culpability under the Act. *United States* v. *Bornstein*, 423 U. S. 303, 309 (1976); *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 541–545 (1943).

The Government's principal argument for affirmance of petitioners' § 371 convictions, however, is a great deal broader than the proposition stated above. The Government argues that, because Seminole received financial assistance and some supervision from the United States, a conspiracy to defraud *Seminole* is *itself* a conspiracy "to defraud the United States."

The conspiracies criminalized by § 371 are defined not only by the nature of the injury intended by the conspiracy, and the method used to effectuate the conspiracy, but also—and most importantly—by the *target* of the conspiracy. Section 371 covers conspiracies to defraud "the United States or any agency thereof," a phrase that the Government concedes fails to describe Seminole Electric. Tr. of Oral Arg. 26 ("We do not say they are federal agents"). The Government suggests, however, that Seminole served as an intermediary performing official functions on behalf of the Federal Government, and on this basis a conspiracy to defraud Seminole may constitute a conspiracy to defraud the United States under § 371.

The Government suggests that this position is supported by the Court's reasoning in *Dixson* v. *United States*, 465 U. S. 482 (1984), a decision involving the scope of the federal bribery statute, 18 U. S. C. § 201(a). Far from supporting the Government's position in this case, the reasoning of the Court in *Dixson* illustrates why the argument is untenable. For the purpose of § 201's provisions pertaining to bribery of public officials and witnesses, § 201(a) defined "public official" to include "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof . . . in any official function, under or by authority of any such department, agency, or branch of Government." The question presented in *Dixson* was whether officers of a private, nonprofit corporation administering the expenditure of federal community development block grants were "public officials" under § 201(a). Although the "on behalf of" language in § 201(a) was open to an interpretation that covered the defendants in that case, it was not unambiguously so. Therefore, the Court found

§201(a) applicable to the defendants only after it concluded that such an interpretation was supported by the section's legislative history. See *Dixson*, 465 U. S., at 491–496. "If the legislative history fail[ed] to clarify the statutory language," the Court observed, "our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases." *Id.*, at 491; see *Rewis* v. *United States*, 401 U. S. 808, 812 (1971).

Unlike the interpretation of the federal bribery statute adopted by the Court in *Dixson*, the interpretation of §371 proposed by the Government in this case has not even an arguable basis in the plain language of §371. In *Dixson* the Court construed §201(a)'s reference to those acting "on behalf of the United States." Rather than seeking a particular interpretation of ambiguous statutory language, the Government, in arguing that §371 covers conspiracies to defraud those acting on behalf of the United States, asks this Court to expand the reach of a criminal provision by reading new language into it. This we cannot do.

Moreover, even if the Government's interpretation of §371 could be pegged to some language in that section, the Government has presented us with nothing to overcome our rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, *supra*, at 812. The Government has wrested no aid from §371's stingy legislative history. Neither has the Government suggested much to commend its interpretation in terms of clarity of application. Petitioners assert that the Government's logic would require any conspiracy to defraud someone who receives federal assistance to fall within §371. The Government replies that "there must be substantial ongoing federal supervision of the defrauded intermediary or delegation of a distinctly federal function to that intermediary to render a fraud upon the intermediary a fraud upon the 'United States.'" Brief for United States 25–26. Yet the facts of this case demonstrate the difficulty of ascertaining how much federal supervision should be considered "substantial." The Government emphasizes the supervisory powers granted the REA in the loan agreement; petitioners argue that the restrictions placed by the REA on Seminole were comparable to those "that a bank places on any borrower in connection with a secured transaction." Tr. of Oral Arg. 19. Given the immense variety of ways the Federal Government provides financial assistance, and the fact that such assistance is always accompanied by restrictions on its use, the inability of the "substantial supervision" test to provide any real guidance is apparent. "A criminal statute, after if not before it is judicially construed, should have a discernable meaning." *Dixson* v. *United States*, *supra*, at 512 (dissenting opinion).

Although the Government's sweeping interpretation of §371—which would have, in effect, substituted "anyone receiving federal financial assistance and supervision" for the phrase "the United States or any agency thereof" in §371—must fail, the Government also charged petitioners with conspiring to manipulate Seminole in order to cause misrepresentations to be made to the REA, an agency of the United States. The indictment against petitioners stated that:

> "It was further a part of the conspiracy that the defendants would and did cause Seminole Electric to falsely state and represent to the Rural Electrification Administration that an REA-approved competitive bidding procedure had been followed in awarding the access road construction contracts." App. 7.

If the evidence presented at trial was sufficient to establish that petitioners conspired to cause Seminole to make misrepresentations to the REA, then petitioners' convictions may stand. Because the sufficiency of the evidence on this particular charge in the indictment was not passed on below, we remand this case to the Court of Appeals for further proceedings on this question.

IV

Each mail fraud count of the indictment charged Tanner and Conover with acting in furtherance of "a scheme and artifice to defraud:

> "(a) the United States by impeding, impairing, obstructing and defeating the lawful function of the Rural Electrification Administration in its administration and enforcement of its guaranteed loan program; and
>
> "(b) Seminole Electric Cooperative, Inc., of its right to have its process and procedures for the procurement of materials, equipment and services run honestly and free from deceit, corruption and fraud, and of its right to the honest and faithful services of its employees." *Id.*, at 12.

On appeal, petitioners argued that the evidence did not establish *either* a scheme to defraud the United States *or* a scheme to defraud Seminole. Petitioners' arguments on the scheme to defraud the United States were raised in the context of the § 371 convictions. If the § 371 convictions were reversed, petitioners argued, then the mail fraud convictions could stand only if the Government proved a scheme to defraud Seminole. 772 F. 2d, at 771.

The Court of Appeals discussion on this point is as follows:

> "Appellants argue that the convictions on counts II through V can be upheld only if the evidence establishes that they used the mails in effectuating a scheme to defraud Seminole. This is so, appellants contend, because the indictment did not charge, and the evidence did not establish, a violation of 18 U. S. C. § 371. We have already rejected this proposition. *Thus, we need not reach the question of whether the evidence establishes the use of the mails for the purpose of effectuating a scheme to defraud Seminole.*" *Ibid.* (emphasis added).

If, on remand, the premise on which the Court of Appeals based its affirmance of the mail fraud convictions—that petitioners' actions constituted a conspiracy to defraud the United States under § 371—is rejected, the Court of Appeals must consider petitioners' argument that the evidence did not establish a scheme to defraud Seminole under the mail fraud statute, 18 U. S. C. § 1341.

The judgment of the Court of Appeals is affirmed in part and remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and dissenting in part.

Every criminal defendant has a constitutional right to be tried by competent jurors. This Court has long recognized that "[d]ue process implies a tribunal both impartial and mentally competent to afford a hearing," *Jordan* v. *Massachusetts*, 225 U. S. 167, 176 (1912), "a jury capable and willing to decide the case solely on the evidence before it." *Smith* v. *Phillips*, 455 U. S. 209, 217 (1982). If, as is charged, members of petitioners' jury were intoxicated as a result of their use of drugs and alcohol to the point of sleeping through material portions of the trial, the verdict in this case must be set aside. In directing district courts to ignore sworn allegations that jurors engaged in gross and debilitating misconduct, this Court denigrates the precious right to a competent jury. Accordingly, I dissent from that part of the Court's opinion.[1]

I

At the outset, it should be noted that petitioners have not asked this Court to decide whether there is sufficient evidence to impeach the jury's verdict. The question before us is only whether an evidentiary hearing is required to explore allegations of juror misconduct and incompetency. As the author of today's opinion for the Court has noted:

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[1] I agree with the Court's disposition of petitioners' convictions under 18 U. S. C. §§ 371 and 1341. Thus, I join Parts III and IV of the Court's opinion.

> "A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case." *Smith* v. *Phillips*, *supra*, at 222 (O'CONNOR, J., concurring).[2]

The allegations of juror misconduct in this case are profoundly disturbing. A few weeks after the verdict was returned, one of the jurors, Vera Asbel, contacted defense counsel and told him she had something she wanted to get off her conscience. App. 247. She stated that at the trial some of the male jurors were drinking every day and then "slept through the afternoons." *Ibid.* According to Asbel, another juror, Tina Franklin, could confirm these charges. *Ibid.* Despite these revelations, the District Court refused to hold an evidentiary hearing. Like this Court, the District Judge believed that Asbel's statements to defense counsel were inadmissible under Rule 606(b). *Id.*, at 181–182.

Several months later, Asbel's allegations were buttressed by a detailed report of rampant drug and alcohol abuse by jury members, volunteered by another juror, Daniel Hardy.[3] In a sworn statement, Hardy indicated that *seven* members of the jury, including himself, regularly consumed alcohol during the noon recess. App. 210. He reported that four male jurors shared up to three pitchers of beer on a daily basis. *Id.*, at 212. Hardy himself "consumed alcohol all the time." *Id.*, at 239. The female juror selected as foreperson was described as "an alcoholic" who would drink a liter of wine at lunch. *Id.*, at 213–214. Two other female jurors regularly consumed one or two mixed drinks at lunch. *Id.*, at 215.

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[2] See also *Remmer* v. *United States*, 347 U. S. 227, 229–230 (1954); *Sullivan* v. *Fogg*, 613 F. 2d 465, 467–468 (CA2 1980).

[3] Both Asbel and Hardy contacted defense counsel on their own initiative. Asbel telephoned, see App. 246–247, while Hardy simply showed up at counsel's home and stated: "I had some things on my mind that had been bothering me a long time and I wanted to clear my conscience." *Id.*, at 209. In addition, the District Judge reported that the jury foreperson had contacted his office. "She wanted to know when there was going to be a hearing and she wanted to testify." *Id.*, at 172. This is not a case where jury members were being pursued and harassed by losing litigants. Thus, the concerns underlying the local rule cited by the Court, *ante*, at 126, are not implicated in this case.

The four male jurors did not limit themselves to alcohol, however. They smoked marijuana "[j]ust about every day." *Id.*, at 222. In addition, two of them ingested "a couple lines" of cocaine on several occasions. *Id.*, at 225. At times two of the jurors used all three substances—alcohol, cocaine, and marijuana. *Id.*, at 229. Hardy also maintained that the principal drug user, identified as "John," used cocaine during breaks in the trial. *Id.*, at 234. "I knew he had that little contraption and he was going to the bathroom and come back down sniffing . . . like he got . . . a cold." *Id.*, at 234–235. Hardy's statement supported Asbel's assessment of the impact of alcohol and drug consumption; he noted that "[m]ost, some of the jurors," were "falling asleep all the time during the trial." *Id.*, at 229. At least as to John, the effects of drugs and alcohol went beyond inability to stay awake at trial: "John just talked about how he was flying," which Hardy understood to mean that "he was messed up." *Ibid.* Hardy admitted that on one day during the trial his reasoning ability was affected by his use of alcohol and marijuana. *Id.*, at 239. These allegations suggest that several of the jurors' senses were significantly dulled and distorted by drugs and alcohol.[4] In view of these charges, Hardy's characterization of the jury as "one big party," *id.*, at 209, is quite an understatement.

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[4] The Court's attempt to downplay the seriousness of the charges of incompetence is unconvincing: "The only allegations concerning the jurors' ability to properly consider the evidence were Hardy's observations that some jurors were 'falling asleep all the time during the trial,' and that Hardy's own reasoning ability was affected on one day of the trial." *Ante*, at 126. Even if this were the extent of the incompetence alleged, the

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Despite the seriousness of the charges, the Court refuses to allow petitioners an opportunity to vindicate their fundamental right to a competent jury. The Court holds that petitioners are absolutely barred from exploring allegations of juror misconduct and incompetency through the only means available to them—examination of the jurors who have already voluntarily come forward. The basis for the Court's ruling is the mistaken belief that juror testimony concerning drug and alcohol abuse at trial is inadmissible under Federal Rule of Evidence 606(b) and is contrary to the policies the Rule was intended to advance.

I readily acknowledge the important policy considerations supporting the common-law rule against admission of jury testimony to impeach a verdict, now embodied in Federal Rule of Evidence 606(b): freedom of deliberation, finality of verdicts, and protection of jurors against harassment by dissatisfied litigants. See, *e. g.*, *McDonald* v. *Pless*, 238 U. S. 264, 267–268 (1915); Advisory Committee's Notes on Fed. Rule Evid. 606(b), 28 U. S. C. App., p. 700. It has been simultaneously recognized, however, that "simply putting verdicts beyond effective reach can only promote irregularity and injustice." *Ibid.* If the above-referenced policy considerations seriously threaten the constitutional right to trial by a fair and impartial jury, they must give way. See *Parker* v. *Gladden*, 385 U. S. 363 (1966); *Mattox* v. *United States*, 146 U. S. 140 (1892).

In this case, however, we are not faced with a conflict between the policy considerations underlying Rule 606(b) and petitioners' Sixth Amendment rights. Rule 606(b) is not ap-

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claim that several jurors were "falling asleep all the time during the trial" and that one had impaired mental faculties raises a serious question of juror incompetence. If only one juror were shown to be incompetent, the verdict could not stand. Cf. *Parker* v. *Gladden*, 385 U. S. 363, 365–366 (1966).

plicable to juror testimony on matters *unrelated* to the jury's deliberations. By its terms, Rule 606(b) renders jurors incompetent to testify only as to three subjects: (i) any "matter or statement" occurring during deliberations; (ii) the "effect" of anything upon the "mind or emotions" of any juror as it relates to his or her "assent to or dissent from the verdict"; and (iii) the "mental processes" of the juror in connection with his "assent to or dissent from the verdict."[5] Even as to matters involving deliberations, the bar is not absolute.[6]

It is undisputed that Rule 606(b) does not exclude juror testimony as to matters occurring before or after deliberations. See 3 D. Louisell & C. Mueller, Federal Evidence §290, p. 151 (1979); cf. Note, Impeachment of Verdicts by Jurors—Rule of Evidence 606(b), 4 Wm. Mitchell L. Rev. 417, 431, n. 88 (1978). But, more particularly, the Rule only "operates to prohibit testimony as to *certain* conduct by the jurors which has no verifiable manifestations," 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶606[04], p. 606–28 (1985) (emphasis added); as to other matters, jurors remain competent to testify. See Fed. Rule Evid. 601. Because petitioners' claim of juror misconduct and incompetency involves objectively verifiable conduct occurring prior to deliberations, juror testimony in support of the claims is admissible under Rule 606(b).

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[5] Rule 606(b) provides, in relevant part:

"[A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

[6] Rule 606(b) expressly authorizes jurors to testify as to "extraneous prejudicial information" or "outside influence." See *infra*, at 140, and n. 9.

The Court's analysis of legislative history confirms the inapplicability of Rule 606(b) to the type of misconduct alleged in this case. As the Court emphasizes, the debate over two proposed versions of the Rule—the more restrictive Senate version ultimately adopted and the permissive House version, reproduced *ante*, at 123, n., focused on the extent to which jurors would be permitted to testify as to what transpired *during the course of the deliberations themselves.*[7] Similarly, the Conference Committee Report, quoted by the Court, *ante*, at 125, compares the two versions solely in terms of the admissibility of testimony as to matters occurring during, or relating to, the jury's deliberations: "[T]he House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring *during the course of the jury's deliberations.*" H. R. Conf. Rep. No. 93–1597, p. 8 (1974) (emphasis added). The obvious conclusion, and the one compelled by Rule 601, is that *both* versions of Rule 606(b) would have permitted jurors to testify as to matters not involving deliberations. The House Report's passing reference to juror intoxication during deliberations, quoted *ante*, at 122–123, is not to the contrary. Reflecting Congress' consistent focus on the deliberative process, it suggests only that the authors of the House Report believed that the Senate version of Rule 606(b) did not allow testimony as to juror intoxication during deliberations.[8]

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[7] Proponents of the more restrictive Senate version were reluctant to allow juror testimony as to irregularities in the process by which a verdict was reached, such as the resort to a "quotient verdict." See, *e. g.*, 120 Cong. Rec. 2374–2375 (1974) (statement of Rep. Wiggins); 117 Cong. Rec. 33642, 33645 (1971) (letter from Sen. McClellan); *id.*, at 33649, 33655 (Dept. of Justice Analysis and Recommendations Regarding Revised Draft of Proposed Rules of Evidence for the U. S. Courts and Magistrates).

As the Court explains, *ante* at 124, the Senate rejected the House version because it "would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's *internal deliberations*, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations." S. Rep. No. 93–1277, p. 13 (1974) (emphasis added). See also *id.*, at 14 ("[R]ule 606 should not permit any inquiry into the internal deliberations of the jurors").

In this case, no invasion of the jury deliberations is contemplated. Permitting a limited postverdict inquiry into juror consumption of alcohol and drugs *during trial* would not "make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, 238 U. S., at 267–268. "Allowing [jurors] to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected." Advisory Committee's Notes on Fed. Rule Evid. 606(b), 28 U. S. C. App., p. 701.

Even if I agreed with the Court's expansive construction of Rule 606(b), I would nonetheless find the testimony of juror intoxication admissible under the Rule's "outside influence" exception.[9] As a common-sense matter, drugs and

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[8] H. R. Rep. No. 93–650, p. 10 (1973) ("Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations").

[9] The sole support for the Court's cramped interpretation of this exception is the isolated reference to juror intoxication *at deliberations*, contained in the House Report, quoted *supra*, n. 8. The source for the reference is a letter to the House Subcommittee, to the effect that the version of the Rule adopted by the Senate would not allow inquiry into juror consumption of alcohol during deliberations. The letter was offered in support of reinstatement of the original form of the Rule (the version adopted by the House); the letter focused primarily on the question whether inquiry into quotient verdicts should be permitted. See Rules of Evidence, Hearings before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93d Cong., 1st Sess., 389 (1973). In a subsequent letter, the writer dropped any reference to the question of intoxication, focusing exclusively on the issue of

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alcohol *are* outside influences on jury members. Commentators have suggested that testimony as to drug and alcohol abuse, even during deliberations, falls within this exception. "[T]he present exception paves the way for proof by the affidavit or testimony of a juror that one or more jurors became intoxicated during deliberations. . . . Of course the use of hallucinogenic or narcotic drugs during deliberations should similarly be provable." 3 Louisell & Mueller, Federal Evidence, § 289, pp. 143–145 (footnote omitted). See 3 Weinstein & Berger, Weinstein's Evidence, *supra*, ¶ 606[04], pp. 606–29—606–32 ("Rule 606(b) would not render a witness incompetent to testify to juror irregularities such as intoxication . . . regardless of whether the jury misconduct occurred within or without the jury room"). The Court suggests that, if these are outside influences, "a virus, poorly prepared food, or a lack of sleep" would also qualify. *Ante*, at 122. Distinguishing between a virus, for example, and a narcotic drug is a matter of line-drawing. Courts are asked to make these sorts of distinctions in numerous contexts; I have no doubt they would be capable of differentiating between the intoxicants involved in this case and minor indispositions not affecting juror competency.

The Court assures us that petitioners' Sixth Amendment interests are adequately protected by other aspects of the trial process: *voir dire;* observation during trial by the court, counsel, and courtroom personnel; and observation by fellow jurors (so long as they report inappropriate juror behavior to the court before a verdict is rendered). *Ante*, at 127. Reliance on these safeguards, to the exclusion of an evi-

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quotient verdicts. See Rules of Evidence (Supplement), Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 1st Sess., 27–28 (1973). Moreover, this reference is hardly dispositive. The comparison was provided to show that the House version was "the better practice." H. R. Rep. No. 93–650, *supra*, at 10. None of the subsequent Committee Reports make any allusion to juror intoxication.

dentiary hearing, is misguided. *Voir dire* cannot disclose whether a juror will choose to abuse drugs and alcohol during the trial. Moreover, the type of misconduct alleged here is not readily verifiable through nonjuror testimony. The jurors were not supervised by courtroom personnel during the noon recess, when they consumed alcoholic beverages and used drugs. Hardy reported that he and his three companions purposely avoided observation. They smoked marijuana and used cocaine first in a municipal parking garage and later "[d]own past the Hyatt Regency" because it was "away from everybody." App. 218, 222.

Finally, any reliance on observations of the court is particularly inappropriate on the facts of this case. The District Judge maintained that he had a view of the jury during the trial, and "[y]ou might infer . . . that if I had seen somebody sleeping I would have done something about that." *Id.*, at 167. However, as the portions of the trial transcript quoted *ante*, at 113–114, indicate, the judge had abdicated any responsibility for monitoring the jury. He stated: "I'm going to—not going to take on that responsibility" and "I'm not going to sit here and watch. I'm—among other things, I'm not going to see—. . . ." Tr. 12-100–12-101.

III

The Court acknowledges that "postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," but maintains that "[i]t is not at all clear . . . that the jury system could survive such efforts to perfect it." *Ante*, at 120. Petitioners are not asking for a perfect jury. They are seeking to determine whether the jury that heard their case behaved in a manner consonant with the minimum requirements of the Sixth Amendment. If we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless.

I dissent.

AGENCY HOLDING CORP. ET AL. *v.* MALLEY-DUFF & ASSOCIATES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86–497. Argued April 21, 1987—Decided June 22, 1987*

In February 1978, petitioner Crown Life Insurance Co. terminated its relationship with its agent, respondent Malley-Duff & Associates (Malley-Duff), for failure to satisfy a production quota. Alleging, *inter alia*, that the real reason for the termination was petitioners' desire to acquire its lucrative territory, Malley-Duff brought suit in March 1981 under the Racketeer Influenced and Corrupt Organizations Act (RICO). The Federal District Court granted petitioners' summary judgment motion, dismissing the RICO claims on the ground that they were barred by Pennsylvania's 2-year fraud statute of limitations. In the absence of a RICO statute of limitations, the court concluded that the 2-year statute was the best state law analogy. However, the Court of Appeals reversed, holding that the State's "catchall" 6-year residual statute of limitations contained the appropriate limitations period for all RICO claims arising in the State.

Held:

1. The 4-year statute of limitations applicable to Clayton Act civil enforcement actions, 15 U. S. C. § 15b, applies in RICO civil enforcement actions. Because the predicate acts that may establish a civil RICO violation are far ranging and cannot be reduced to a single generic classification, and because important RICO concepts were unknown to common law, there is a need for a uniform limitations period for civil RICO in order to avoid intolerable uncertainty for parties and time-consuming litigation. The Clayton Act offers the closest analogy to civil RICO, in light of similarities in purpose and structure between the statutes, and the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act's. Moreover, the Clayton Act provides a far closer analogy to RICO than any state statute. It is unlikely that Congress intended state "catchall" statutes of limitations to apply or that such statutes would fairly serve the federal interests vindicated by RICO, and, in those States that do not have catchalls, any selection of a state statute would be at odds with RICO's *sui generis* nature. RICO cases

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*Together with No. 86–531, *Crown Life Insurance Co. et al.* v. *Malley-Duff & Associates, Inc.*, also on certiorari to the same court.

commonly involve interstate transactions, and the possibility of a multiplicity of applicable state limitations periods presents the dangers of forum shopping and of complex, expensive, and unnecessary litigation. Application of a uniform federal period also avoids the possibility that application of unduly short state periods would thwart the legislative purpose of providing an effective remedy. Section 15b is preferable to the "catchall" federal 5-year statute of limitations that applies in RICO criminal prosecutions, since that statute does not reflect any congressional balancing of the competing equities unique to RICO civil enforcement actions. Pp. 146–156.

2. Because this litigation was filed less than four years after Malley-Duff's termination as Crown Life's agent, which is the earliest time Malley-Duff's RICO action could have accrued, the litigation is timely. Pp. 156–157.

792 F. 2d 341, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 157.

Robert L. Frantz argued the cause for petitioners in No. 86–531. With him on the briefs were *Alexander Black* and *Daniel E. Wille*. *John H. Bingler, Jr.*, argued the cause for petitioners in No. 86–497. With him on the briefs was *Michael R. Bucci, Jr.*

Harry Woodruff Turner argued the cause for respondent in both cases. With him on the brief were *David A. Borkovic* and *Stephen H. Kaufman*.†

JUSTICE O'CONNOR delivered the opinion of the Court.

At issue in these consolidated cases is the appropriate statute of limitations for civil enforcement actions under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1964 (1982 ed. and Supp. III).

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†*David P. Bruton* and *Eric A. Schaffer* filed a brief for Congress Financial Corporation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for A. J. Cunningham Packing Corp. et al. by *Michael D. Fishbein* and *Michael P. Malakoff*; and for HMK Corporation by *James G. Harrison*, *Lawrence D. Diehl*, *Robert A. Blackwood*, and *G. Robert Blakey*.

I

Petitioner Crown Life Insurance Company (Crown Life) is a Canadian corporation engaged in the business of selling life, health, and casualty insurance policies. Respondent Malley-Duff & Associates, Inc. (Malley-Duff), was an agent of Crown Life for a territory in the Pittsburgh area. Crown Life terminated Malley-Duff's agency on February 13, 1978, after Malley-Duff failed to satisfy a production quota. This case is the second of two actions brought by Malley-Duff following that termination.

In April 1978, Malley-Duff filed its first suit *(Malley-Duff I)* against the petitioners in the United States District Court for the Western District of Pennsylvania, alleging violations of the federal antitrust laws and a state law claim for tortious interference with contract. See 734 F. 2d 133 (CA3 1984). Before the antitrust action was brought to trial, however, on March 20, 1981, Malley-Duff brought this action *(Malley-Duff II)* in the same court, alleging causes of action under RICO, 42 U. S. C. § 1985, and state civil conspiracy law. Initially, *Malley-Duff II* was consolidated with *Malley-Duff I*, but the two cases were severed before trial. Only the RICO claim of *Malley-Duff II* is at issue before this Court.

The RICO claim arose out of two alleged incidents. First, Malley-Duff alleges that Crown Life, together with several Crown Life employees and petitioner Agency Holding Corporation formed an enterprise whose purpose was to acquire by false and fraudulent means and pretenses various Crown Life agencies that had lucrative territories. This enterprise allegedly acquired Malley-Duff's agency by imposing an impossibly high annual production quota on Malley-Duff nine months into fiscal year 1977 and then terminating the agency when Malley-Duff failed to meet this quota. Malley-Duff further alleges that the petitioners used a similar scheme to acquire Crown Life agencies in other cities. Second, Malley-Duff alleges that the petitioners obstructed justice during the course of discovery in *Malley-Duff I*.

On July 29, 1982, the petitioners filed a motion for summary judgment. The District Court granted this motion and entered judgment for the petitioners on all counts. The District Court dismissed Malley-Duff's RICO claims on the ground that they were barred by Pennsylvania's 2-year statute of limitations period for fraud, 42 Pa. Cons. Stat. § 5524(7) (1982), concluding that this was the best state law analogy for Malley-Duff's claims. The Court of Appeals for the Third Circuit reversed. In its view, under *Wilson* v. *Garcia*, 471 U. S. 261 (1985), Pennsylvania's "catchall" 6-year residual statute of limitations, § 5527, was the appropriate statute of limitations for all RICO claims arising in Pennsylvania. 792 F. 2d 341 (1986). We granted certiorari, 479 U. S. 983 (1986), to resolve the important question of the appropriate statute of limitations for civil enforcement actions brought under RICO.

II

As is sometimes the case with federal statutes, RICO does not provide an express statute of limitations for actions brought under its civil enforcement provision. Although it has been suggested that federal courts always should apply the state statute of limitations most analogous to each individual case whenever a federal statute is silent on the proper limitations period, see *Wilson* v. *Garcia*, *supra*, at 280 (dissent); *DelCostello* v. *Teamsters*, 462 U. S. 151, 174 (1983) (O'CONNOR, J., dissenting), a clear majority of the Court rejected such a single path. Instead, the Court has stated:

> "In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law. 'The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fash-

ioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles.' " *Del-Costello* v. *Teamsters*, *supra*, at 158–159, quoting *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946).

The characterization of a federal claim for purposes of selecting the appropriate statute of limitations is generally a question of federal law, *Wilson* v. *Garcia*, *supra*, at 269–270, and in determining the appropriate statute of limitations, the initial inquiry is whether all claims arising out of the federal statute "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." 471 U. S., at 268. Once this characterization is made, the next inquiry is whether a federal or state statute of limitations should be used. We have held that the Rules of Decision Act, 28 U. S. C. § 1652, requires application of state statutes of limitations unless "a timeliness rule drawn from elsewhere in federal law should be applied." *DelCostello* v. *Teamsters*, 462 U. S., at 159, n. 13; see also *id.*, at 174, n. 1 (O'CONNOR, J., dissenting). Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law. In some limited circumstances, however, our characterization of a federal claim has led the Court to conclude that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *DelCostello* v. *Teamsters*, *supra*, at 161. While the mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations, in some circumstances the Court has found it more appropriate to borrow limitation periods found in other federal, rather than state, statutes:

> "[A]s the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods. Nevertheless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." *DelCostello* v. *Teamsters*, *supra*, at 171–172.

See also *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U. S. 355 (1977) (adopting federal statute of limitations for Equal Employment Opportunity Commission enforcement actions); *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 (1958) (federal limitations period applied to unseaworthiness action under general admiralty law); *Holmberg* v. *Armbrecht*, *supra* (refusing to apply state limitations period to action to enforce federally created equitable right).

Federal courts have not adopted a consistent approach to the problem of selecting the most appropriate statute of limitations for civil RICO claims. Indeed, an American Bar Association task force described the current state of the law regarding the applicable statute of limitations for civil RICO claims as "confused, inconsistent, and unpredictable." Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 391 (1985) (hereinafter ABA Report). Some courts have simply used the state limitations period most similar to the predicate offenses alleged in the particular RICO claim. See, *e. g.*, *Silverberg* v. *Thomson McKinnon Securities, Inc.*, 787 F. 2d 1079 (CA6 1986); *Burns* v. *Ersek*, 591 F. Supp. 837 (Minn. 1984). Others, such as the Court of Appeals in this case, have chosen a uniform statute of limitations applicable to all civil RICO actions brought within a given State. See, *e. g., Tellis* v. *United States Fidelity & Guaranty Co.*, 805 F. 2d 741 (CA7 1986); *Compton* v. *Ide*, 732 F. 2d 1429 (CA9 1984); *Teltronics Services, Inc.* v. *Anaconda-Ericsson, Inc.*, 587 F. Supp. 724 (EDNY 1984). The courts, however, have uniformly looked to state statutes of limitations rather than a federal uniform statute of limitations. See ABA Report 387.

We agree with the Court of Appeals that, for reasons similar to those expressed in *Wilson* v. *Garcia*, 471 U. S., at 272–275, a uniform statute of limitations should be selected in RICO cases. As Judge Sloviter aptly observed:

> "RICO is similar to [42 U. S. C.] § 1983 in that both 'encompass numerous and diverse topics and subtopics.' [*Wilson* v. *Garcia*, *supra*, at 273.] Many civil RICO actions have alleged wire and mail fraud as predicate acts, but 18 U. S. C. § 1961 defines 'racketeering activity' to include nine state law felonies and violations of over 25 federal statutes, including those prohibiting bribery, counterfeiting, embezzlement of pension funds, gambling offenses, obstruction of justice, interstate transportation of stolen property, and labor crimes." *A. J. Cunningham Packing Corp.* v. *Congress Financial Corp.*, 792 F. 2d 330, 337 (CA3 1986) (concurring in judgment).

Although the large majority of civil RICO complaints use mail fraud, wire fraud or securities fraud as the required predicate offenses, a not insignificant number of complaints allege criminal activity of a type generally associated with professional criminals such as arson, bribery, theft and political corruption. ABA Report 56–57. As the Court of Appeals noted, "[e]ven RICO claims based on 'garden variety' business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods." 792 F. 2d, at 348. Moreover, RICO is designed to remedy injury caused by a pattern of racketeering, and "[c]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to common law." *Ibid.*

Under these circumstances, therefore, as with § 1983, a uniform statute of limitations is required to avoid intolerable "uncertainty and time-consuming litigation." *Wilson* v. *Garcia*, 471 U. S., at 272. This uncertainty has real-world consequences to both plaintiffs and defendants in RICO actions. "Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." *Id.*, at 275, n. 34. It is not surprising, therefore, that the petitioners no less than the respondent support the adoption of a uniform statute of limitations. See Brief for Petitioners in No. 86–497, p. 17; Brief for Petitioners in No. 86–531, p. 12.

Unlike § 1983, however, we believe that it is a *federal* statute that offers the closest analogy to civil RICO. The Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15, offers a far closer analogy to RICO than any state law alternative. Even a cursory comparison of the two statutes reveals that the civil action provision of RICO was patterned after the Clayton Act. The Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee." 15 U. S. C. § 15(a).

RICO's civil enforcement provision provides:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and

the cost of the suit, including a reasonable attorney's fee." 18 U. S. C. § 1964(c).

Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury "in his business or property by reason of" a violation.

The close similarity of the two provisions is no accident. The "clearest current" in the legislative history of RICO "is the reliance on the Clayton Act model." *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 489 (1985). As early as 1967, Senator Hruska had proposed bills that would use "the novel approach of adapting antitrust concepts to thwart organized crime." ABA Report 78. As Senator Hruska explained:

> "The antitrust laws now provide a well established vehicle for attacking anticompetitive activity of all kinds. They contain broad discovery provisions as well as civil and criminal sanctions. These extraordinarily broad and flexible remedies ought to be used more extensively against the 'legitimate' business activities of organized crime." 113 Cong. Rec. 17999 (1967).

The American Bar Association's Antitrust Section agreed that "[t]he time tested machinery of the antitrust laws contains several useful and workable features which are appropriate for use against organized crime," including the use of treble-damages remedies. 115 Cong. Rec. 6995 (1969).

The use of an antitrust model for the development of remedies against organized crime was unquestionably at work when Congress later considered the bill that eventually became RICO. That bill, introduced by Senators McClellan and Hruska in 1969, did not, in its initial form, include a private civil enforcement provision. Representative Steiger, however, proposed the addition of a private treble-damages action "similar to the private damage remedy found in the anti-trust laws." Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970). During these same hearings, the American Bar Association proposed an amendment "to include the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act" that would adopt a treble-damages civil remedy. *Id.*, at 543–544. The Committee approved the amendment, and the full House approved a bill that included the civil enforcement remedy. During the House debates, the bill's sponsor described the civil enforcement remedy as "another example of the antitrust remedy being adapted for use against organized criminality," 116 Cong. Rec. 35295 (1970), and Representative Steiger stated that he viewed the RICO civil enforcement remedy as a "parallel private . . . remed[y]" to the Clayton Act. *Id.*, at 27739 (letter to House Judiciary Committee).

Together with the similarities in purpose and structure between RICO and the Clayton Act, the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act strongly counsels in favor of application of the 4-year statute of limitations used for Clayton Act claims. 15 U. S. C. § 15b. This is especially true given the lack of any satisfactory state law analogue to RICO. While "[t]he atrocities" that led Congress to enact 42 U. S. C. § 1983 "plainly sounded in tort," *Wilson* v. *Garcia*, 471 U. S., at 277, there is no comparable single state law analogue to RICO. As noted above, the predicate acts that may establish racketeering activity under RICO are far ranging, and unlike § 1983, cannot be reduced to a single generic characterization. The Court of Appeals, therefore, selected Pennsylvania's "catchall" statute of limitations. In *Wilson* v. *Garcia, supra,* at 278, we rejected the use of a "catchall" statute of limitations because we concluded that it was unlikely that Congress would have intended such a statute of limitations to apply. Furthermore, not all States have a "catchall" statute of limitations, see ABA Report 391, and the absence of such a statute in some States "distinguishes the RICO choice from the § 1983 choice made in *Wilson* v. *Garcia.*" *A. J. Cunningham Packing Corp.* v. *Congress Financial Corp.*, 792 F. 2d, at 339 (Sloviter, J., concurring in judgment). While we concluded in *Wilson* v. *Garcia* that characterization of all § 1983 actions as personal injury claims minimized the risk that the choice of a state limitations period "would not fairly serve the federal interests vindicated by § 1983," 471 U. S., at 279, "a similar statement could not be made with confidence about RICO and state statutory 'catch alls.' " *A. J. Cunningham Packing Corp.* v. *Congress Financial Corp.*, 792 F. 2d, at 339. Any selection of a state statute of limitations in those States without a catchall statute would be wholly at odds with the Court of Appeals' recognition of the *sui generis* nature of RICO. *Ibid.*

The federal policies at stake and the practicalities of litigation strongly suggest that the limitations period of the Clayton Act is a significantly more appropriate statute of limitations than any state limitations period. JUSTICE SCALIA recognizes that under his preferred approach to the question before us a federal statute "may be sufficient to pre-empt a state statute that discriminates against federal rights or is too short to permit the federal right to be vindicated." *Post*, at 162. In our view the practicalities of RICO litigation present equally compelling reasons for federal pre-emption of otherwise available state statutes of limitations even under JUSTICE SCALIA's approach. As this case itself illustrates, RICO cases commonly involve interstate transactions, and conceivably the statute of limitations of several States could govern any given RICO claim. Indeed, some nexus to interstate or foreign commerce is required as a jurisdictional element of a civil RICO claim, 18 U. S. C. §§1962(b) and (c), and the heart of any RICO complaint is the allegation of a *pattern* of racketeering. Thus, predicate acts will often occur in several States. This is in marked contrast to the typical § 1983 suit, in which there need not be any nexus to interstate commerce, and which most commonly involves a dispute wholly within one State. The multistate nature of RICO indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would "virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter." ABA Report 392. Moreover, application of a uniform federal limitations period avoids the possibility of the application of unduly short state statutes of limitations that would thwart the legislative purpose of creating an effective remedy. *Ibid.;* see also *DelCostello* v. *Teamsters*, 462 U. S., at 166, 167–168 (concluding that the federal statute of limitations was appropriate because state limitation periods were too short).

The petitioners, however, suggest that the legislative history reveals that Congress specifically considered and rejected a uniform federal limitations period. The petitioners note that Representative Steiger offered a comprehensive amendment that, together with six other provisions, included a proposed 5-year statute of limitations. 116 Cong. Rec. 35346 (1970). Congress did not "reject" this proposal, however. Instead, Representative Steiger voluntarily withdrew the proposed amendment immediately after it was introduced so that it could be referred to the House Judiciary Committee for study. *Id.*, at 35346–35347. The reason for the reference to the House Judiciary Committee had absolutely nothing to do with the proposed statute of limitations. Instead, the amendment had included yet another civil remedy, and Representative Poff observed that "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have." *Id.*, at 35346. Under these circumstances, we are unable to find any congressional intent opposing a uniform federal statute of limitations. The petitioners also point to the fact that a predecessor bill to RICO introduced by Senator Hruska, S. 1623, included a 4-year statute of limitations. 115 Cong. Rec. 6996 (1969). Senator Hruska, however, dropped his support for this bill in order to introduce with Senator McClellan the bill that eventually became RICO. See ABA Report 87. The reason that this new bill did not include a statute of limitations is simple, and in no way even remotely suggests the rejection of a uniform federal statute of limitations: the new bill included no private treble-damages remedy, and thus obviously had no need for a limitations period. *Id.*, at 88. Finally, the petitioners cite the inclusion of a statute of limitations provision in S. 16, the Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972, which would have amended § 1964 of RICO but was not enacted. 118 Cong. Rec. 29368 (1972). This proposed bill, however, was not focused on the addition of a statute of limitations. Instead, the purpose of the bill was to broaden even further the remedies available under RICO. In particular, it would have authorized the United States itself to sue for damages and to intervene in private damages actions, and it would have further permitted private actions for injunctive relief. Congress' failure to enact this proposal, therefore, cannot be read as a rejection of a uniform federal statute of limitations.

We recognize that there is also available the 5-year statute of limitations for *criminal prosecutions* under RICO. See 18 U. S. C. § 3282. This statute of limitations, however, is the general "catchall" federal criminal statute of limitations. RICO itself includes no express statute of limitations for either civil or criminal remedies, and the 5-year statute of limitations applies to criminal RICO prosecutions only because Congress has provided such a criminal limitations period when no other period is specified. Thus, the 5-year statute of limitations for criminal RICO actions does not reflect any congressional balancing of the competing equities unique to civil RICO actions or, indeed, any other federal civil remedy. In our view, therefore, the Clayton Act offers the better federal law analogy.

JUSTICE SCALIA accepts our conclusion that state statutes of limitations are inappropriate for civil RICO claims, but concludes that if state codes fail to furnish an appropriate limitations period, there is none to apply. *Post*, at 170. As this Court observed in *Wilson* v. *Garcia*, 471 U. S., at 271, however:

> "A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' *Adams* v. *Woods*, 2 Cranch 336, 342 (1805). Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten."

In sum, we conclude that there is a need for a uniform statute of limitations for civil RICO, that the Clayton Act clearly provides a far closer analogy than any available state statute, and that the federal policies that lie behind RICO and the practicalities of RICO litigation make the selection of the 4-year statute of limitations for Clayton Act actions, 15 U. S. C. § 15b, the most appropriate limitations period for RICO actions.

This litigation was filed on March 20, 1981, less than four years after the earliest time Malley-Duff's RICO action could have accrued—*i. e.*, the date of Malley-Duff's termination on February 13, 1978. Accordingly the litigation was timely brought. Because it is clear that Malley-Duff's RICO claims accrued within four years of the time the complaint was filed, we have no occasion to decide the appropriate time of accrual for a RICO claim.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, concurring in the judgment.

The Court today continues on the course adopted in *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), and concludes that although Congress has enacted no federal limitations period for civil actions for damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1964 (1982 ed. and Supp. III), it will supply one by "borrowing" the 4-year statute of limitations applicable to suits under the Clayton Act. 15 U. S. C. § 15b. While at first glance it may seem a small step from the familiar practice of borrowing state statutes of limitations to today's decision to borrow a federal one, in my view it turns out to be a giant leap into the realm of legislative judgments. I therefore cannot join the Court's opinion.

I

The issue presented by this case cannot arise with respect to federal criminal statutes, as every federal offense is governed by an express limitations period. If no statute specifically defines a limitations period (or prescribes the absence of a limitations period, see 18 U. S. C. § 3281) for a particular offense, a "catchall" statute operates to forbid prosecution, trial, or punishment "unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." § 3282. Congress has not provided that kind of a default limitations period, however, for federal civil suits; and since it has long been enacting civil statutes without express limitations periods, courts have long been wrestling with the problem of determining what, if any, limitations periods to apply. Prior to *DelCostello*, the virtually uniform practice was to look to applicable state statutes of limitations. Indeed, we departed from that practice only when the applicable state limitations period would have frustrated the policy of the federal statute, concluding that in such a case *no* limitations period governs the suit. See *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U. S. 355, 361, 366–372 (1977). Until *DelCostello*, we never responded to legislative silence by applying a limitations period drawn from a different federal statute.

To understand why this new practice differs from—and is less legitimate than—the practice of borrowing state statutes, it is necessary to understand the two-phase history through which the earlier practice developed. It is in turn essential to that understanding to recognize that certain common conceptions about the borrowing of state limitations statutes are mistaken. As Part I–A explains in more detail, the very label used to describe that practice—"borrowing"—is misleading. In its original form, during what I term the "first phase" of the borrowing doctrine, our practice of applying state law in reality involved no borrowing at all; rather, we applied state limitations periods to federal causes of action because we believed that those state statutes applied of their own force, unless pre-empted by federal law. In the "second phase" of our development of the borrowing doctrine, we approached the issue rather differently. Whereas we had originally focused on the federal statute creating the cause of action only for purposes of our pre-emption inquiry—*i. e.*, in order to ascertain whether the otherwise applicable state statute of limitations conflicted with the federal statute's terms or purposes—we later came to believe that the federal statute itself was the source of our obligation to apply state law. That is, instead of treating Congress' silence on the limitations question as a failure to pre-empt state law, we came to treat it as an affirmative directive to borrow state law. In my view, that deviation from the "first phase" approach was an analytical error. It has led in turn to the further error the Court commits (or compounds) today in deciding to treat congressional silence as a directive to borrow a limitations period from a different federal statute. Today's error is by far the more serious of the two. As the history outlined above (and discussed in detail below) suggests, the borrowing of state statutes on the erroneous ground of congressional intent has a basis in, and to a reasonable degree approximates the results of, the approach that I think is correct as an original matter. The same cannot be said for the borrowing of federal statutes.

A

The analysis representing the "first phase" of the borrowing doctrine is exemplified by *McCluny* v. *Silliman*, 3 Pet. 270 (1830), the first case presenting the question of what limitations period, if any, applies to a claim having its source in federal law when federal law does not specify the applicable time limit. Plaintiff-in-error McCluny had sought to purchase land under a federal statute providing for the sale of lands owned by the United States, but the register, a federal officer, had refused his tendered payment. McCluny then brought an action for trespass on the case in the Circuit Court for the District of Ohio, arguing that the register had wrongfully withheld the land, causing him $50,000 in damages. The register prevailed below on the ground that the Ohio statute of limitations governing actions for trespass on the case barred plaintiff's suit. McCluny argued that the Circuit Court had erred. The Ohio limitations statute, he contended, had no application in a suit brought in federal court against a federal officer for violation of a right conferred by an Act of Congress, not because *Congress* did not intend so (an issue raised by neither party to the dispute) but because *the Ohio Legislature* did not intend so. *Id.*, at 270–274. We agreed with McCluny that the issue was whether the statute applied as a matter of Ohio law, see *id.*, at 276 ("The decision in this cause depends upon the construction of the statute of Ohio"), but agreed with the register that under Ohio law, the statute applied. We reasoned that while it was doubtless true that Ohio had not contemplated that its statute would govern such actions, by framing it to apply to all actions for trespass on the case the legislature had designed the statute to cover numerous torts not specifically within its contemplation. *Id.*, at 277–278. At no point did we even question Ohio's power to enact statutes of limitations applicable to federal rights, so long as Congress had not provided otherwise. Rather, we simply noted that it was "well settled" that such statutes are "the law of the forum, and operat[e] upon all who submit themselves to its jurisdiction." *Id.*, at 276–277. In the course of our opinion, we also mentioned the Rules of Decision Act, which provides:

> "[T]he laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." § 34, Judiciary Act of 1789, 1 Stat. 92, codified, as amended, at 28 U. S. C. § 1652.

But we discussed that statute not as the source of Ohio's power, but as confirmation of it where "no special provision had been made by congress," 3 Pet., at 277.

McCluny is an odd case to modern ears, because although a federal statute was clearly the source of McCluny's claim of right, it did not expressly create his cause of action. Yet neither the parties nor the Court raised the question we would certainly ask today: whether the federal statute gave him an "implied right" to sue. Instead McCluny simply brought an action seeking a common-law writ of trespass on the case. That feature of the case leaves open the argument that our acceptance of Ohio's power to pass limitations periods applicable to federal rights was based on the fact that the cause of action itself came from the common law rather than a federal statute.

That argument, however, was rejected in *Campbell* v. *Haverhill*, 155 U. S. 610 (1895), where we were faced with the question whether to apply to a suit for patent infringement a Massachusetts statute of limitations requiring actions for tort to be brought within six years. In patent infringement suits, both the right and the cause of action were created by congressional legislation, and the federal courts had exclusive jurisdiction. Accordingly, it was argued that "the States, having no power to create the right or enforce the remedy, have no power to limit such remedy or to legislate in any manner with respect to the subject matter." *Id.*, at 615. We replied that "this is rather to assert a distinction than to point out a difference," *ibid.*, and that in the absence of congressional provision to the contrary, the States had the power to pass statutes of limitations that apply neutrally to federal rights, *id.*, at 614–615, 618–620 (although they might not have the power to enact statutes that discriminated against federal rights or provided excessively short time periods for bringing suit, *id.*, at 614–615).[1]

B

These early cases provide the foundation for a reasonably coherent theory about the application of state statutes of limitations to federal statutory causes of action. First, state statutes of limitations whose terms appear to cover federal statutory causes of action apply as a matter of state law to such claims, even though the state legislature that enacted the statutes did not have those claims in mind. *McCluny*, *supra*, at 277–278. Second, imposition of limitations periods on federal causes of action is within the States' powers, if not pre-empted by Congress. *Campbell* v. *Haverhill*, *supra*, at

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[1] Although the opinion states that the Rules of Decision Act requires us to apply state statutes, 155 U. S., at 614, and therefore appears to suggest that the Act rather than the state laws themselves was the source of our obligation to do so, a careful reading of the opinion belies that interpretation. Because the Act directs the federal courts to regard state laws as rules of decision only "in cases where they apply," the parties and the Court treated the questions of the applicability of the Act and the applicability of state law of its own force as interchangeable.

614–615, 618–620; *McCluny*, 3 Pet., at 276–277. Third, the obligation to apply state statutes of limitations does not spring from Congress' intent in enacting the federal statute; rather, that intent is relevant only to the question whether the state limitations period had been pre-empted by Congress' failure to provide one. *Campbell* v. *Haverhill*, *supra*, at 616. Fourth, congressional silence on the limitations issue is ordinarily insufficient to pre-empt state statutes; "special provision" by Congress is required to do that. *Ibid.*; *McCluny*, *supra*, at 277. Fifth, the federal statute—its substantive provisions rather than its mere silence—may be sufficient to pre-empt a state statute that discriminates against federal rights or is too short to permit the federal right to be vindicated. *Campbell* v. *Haverhill*, *supra*, at 614–615.

As to the role of the Rules of Decision Act: Although *Campbell* v. *Haverhill* in particular is not clear on the question, the Rules of Decision Act plays no role in deriving the first two principles stated above. It directs federal courts to follow state laws only "in cases where they apply," which federal courts would be required to do even in the absence of the Act. That is clear not only from the borrowing cases, but also from other early opinions of this Court displaying the clear understanding that the Act did not make state laws applicable to any new classes of cases. See *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 464 (1831) (the Rules of Decision Act "has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined"); *Bank of Hamilton* v. *Dudley's Lessee*, 2 Pet. 492, 525–526 (1829) ("The laws of the states . . . would be . . . regarded [as rules of decision in the courts of the United States] independent of that special enactment"); Hill, The *Erie* Doctrine in Bankruptcy, 66 Harv. L. Rev. 1013, 1026, 1035 (1953); see also *Jackson* v. *Chew*, 12 Wheat. 153, 162 (1827) (holding that the Supreme Court would follow rules of property law settled by state-court decisions without mentioning the Rules of Decision Act); *Shelby* v. *Guy*, 11 Wheat. 361, 367 (1826) (holding that the Court was required to follow state statutes and their construction by state courts because of its duty to administer the laws of the respective States, without mentioning the Rules of Decision Act). In fact, because the Act required application of future state laws as well as those in effect at the time of its passage, it would have been considered open to serious constitutional challenge as an improper delegation of congressional legislative power to the States had it been anything other than declaratory on that point. See *Wayman* v. *Southard*, 10 Wheat. 1, 47–48 (1825).

Thus, the Act changes the analysis of the question whether a federal court should look to state law only insofar as it provides the basis for the fourth principle. Its directive to federal courts to apply state law unless federal law otherwise "requires or provides" creates a presumption against implicit pre-emption which must be rebutted by affirmative congressional action, except for the implicit preclusion of state statutes that discriminate against federal claims or provide too short a limitations period to permit vindication of the federal right.

II

So understood, the borrowing doctrine involves no borrowing at all. Instead, it only requires us to engage in two everyday interpretive exercises: the determination of which state statute of limitations applies to a federal claim as a matter of state law, and the determination of whether the federal statute creating the cause of action pre-empts that state limitations period. We need not embark on a quest for an "appropriate" statute of limitations except to the limited extent that making those determinations may entail judgments as to which statute the State would believe "appropriate" and as to whether federal policy nevertheless makes that statute "inappropriate." Finally, if we determine that the state limitations period that would apply under state law is pre-empted because it is inconsistent with the federal statute, that is the end of the matter, and there is no limitation on the federal cause of action.

In my view, that is the best approach to the question before us, and if a different historical practice had not intervened I would adhere to it. See also *DelCostello* v. *Teamsters*, 462 U. S., at 172–174 (STEVENS, J., dissenting). For many years, however, we have used a different analysis. In the second phase of development of the borrowing doctrine, perhaps forgetting its origins, the Court adopted the view that we borrow the "appropriate" state statute of limitations when Congress fails to provide one because that is Congress' directive, implied by its silence on the subject. See *Automobile Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 706 (1966); *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946).[2] As an original matter, that is not a very plausible interpretation of congressional silence. If one did not believe that state limitations periods applied of their own force, the most natural intention to impute to a Congress that enacted no limitations period would be that it wished none. However, after a century and a half of the Court's reacting to congressional silence by applying state statutes—first for the right reason, then for the wrong one—by now at least it *is* reasonable to say that such a result is what Congress must expect, and hence intend, by its silence. The approach therefore has some legitimacy, and in any event generally produces the same results as the one I believe to be correct.[3]

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[2] Thus, although we did not squarely reject our earlier approach until *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), the Court correctly argued in that case that our way of analyzing the issue had changed before then. *Id.*, at 159–160, n. 13. Contrary to the *DelCostello* Court's claim, however, neither our decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), nor the Rules of Decision Act scholarship underlying it in any way required that change. Neither remotely established that that statute applies only in diversity cases. See Hill, The *Erie* Doctrine in Bankruptcy, 66 Harv. L. Rev. 1013, 1033–1034 (1953); see also *DelCostello* v. *Teamsters*, *supra*, at 173, n. 1 (STEVENS, J., dissenting) (noting that "'the [Act] itself neither contains nor suggests . . . a distinction'" between diversity and federal-question cases, quoting *Campbell* v. *Haverhill*, 155 U. S. 610, 616 (1895)); Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 408, n. 122 (1964) (characterizing the view that *Erie* requires application of state law only in diversity cases as an "oft-encountered heresy").

III

As JUSTICE O'CONNOR pointed out in her dissent in *DelCostello*, however, if we are serious about this "congressional intent" justification for the borrowing doctrine, we should at least require some evidence of actual alteration of that intent before departing from it. See 462 U. S., at 174–175 (O'CONNOR, J., dissenting). For if the basis of the rule is, in some form, that Congress knows that we will borrow state statutes of limitations unless it directs otherwise, it also knows that it has to direct otherwise if it wants us to do something else. In addition, as under our former approach, should we discover that there is no appropriate state statute to borrow, because all the available ones run afoul of federal policy, we ought to conclude that there is no limitations period.

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[3] It need not always produce the same results, because the implicit directive attributed to Congress is not (as the old approach provided) that the courts apply the statute of limitations that the *State* deemed appropriate, but rather that the courts instead determine which state limitations period will best serve the policies of the federal statute. See, *e. g.*, *Automobile Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 706 (1966); cf. *Wilson* v. *Garcia*, 471 U. S. 261, 268–269 (1985). Imagine, for example, a federal statute with no limitations period creating a cause of action in favor of handicapped persons discriminated against in the making of contracts. If a State had two statutes of limitations, one covering tortious personal injury, and one covering tortious economic injury, under the old approach the question would have been whether the federal statutory cause of action was an action for personal or economic injury. Under the new approach the question, at least in theory, is whether application of the personal injury or economic injury statute best serves the policies of the federal Act.

Second, even before conducting pre-emption analysis, the old approach can lead to the conclusion that state law supplies no statute of limitations. For example, that would be true in the case of our hypothetical federal statute if a State had limitations periods only for assault and battery. The new approach, however, should never lead to that conclusion, because we have already made the determination that federal law directs us to borrow some limitations period, and the only question is which one.

In fact, however, our analysis under the new approach has not been ruthlessly faithful to its logic, so that it has turned out in practice to be almost indistinguishable from the old approach. See *infra*, at 168–169.

In the case before us, however, the Court does not require any showing of actual congressional intent at all before departing from our practice of borrowing state statutes, prowling hungrily through the Statutes at Large for an appetizing federal limitations period, and pouncing on the Clayton Act. Of course, a showing of actual congressional intent that we depart from tradition and borrow a federal statute is quite impossible. Under ordinary principles of construction, the very identity between the language and structure of the Clayton Act's and RICO's private civil-remedy provisions relied on by the Court as arguments for borrowing 15 U. S. C. § 15b, would, when coupled with Congress' enactment of a limitations period for the former and failure to enact one for the latter, demonstrate—if any intent to depart from the state borrowing rule—a desire for no limitations period at all. The same is suggested by the legislative history discussed by the Court, showing that Congress has passed up several opportunities to impose a federal limitations period on civil RICO claims, *ante*, at 154–155. The Court avoids the troublesome requirement of finding a congressional intent to depart from state borrowing by the simple expedient of reformulating the rule, transforming it from a presumption that congressional silence means that we should apply the appropriate *state* limitations period into a presumption that congressional silence means we should apply the appropriate limitations period, *state or federal.* I cannot go along with this, for two reasons.

First, I can find no legitimate source for the new rule. Whereas our prior practice provides some basis for arguing that when Congress creates a civil cause of action without a limitations period, it expects and intends application of an appropriate state statute, there is no basis whatsoever for arguing that its silence signifies that the most appropriate statute, state or federal, should be borrowed. To the contrary, all available evidence indicates that when Congress intends a federal limitations period for a civil cause of action, it enacts one—for example, 15 U. S. C. § 15b itself. The possibility of borrowing a federal statute of limitations did not occur to any of the parties in this litigation until it was suggested by a concurring judge in the Court of Appeals, see 792 F. 2d 341, 356 (CA3 1986), and all of the Federal Courts of Appeals that have passed on the issue of the appropriate RICO limitations period have applied state statutes. See 792 F. 2d 341 (1986) (case below); *Cullen* v. *Margiotta*, 811 F. 2d 698 (CA2 1987); *La Porte Construction Co.* v. *Bayshore National Bank*, 805 F. 2d 1254 (CA5 1986); *Silverberg* v. *Thomson McKinnon Securities, Inc.*, 787 F. 2d 1079 (CA6 1986); *Tellis* v. *United States Fidelity & Guaranty Co.*, 805 F. 2d 741 (CA7 1986); *Alexander* v. *Perkin Elmer Corp.*, 729 F. 2d 576 (CA8 1984); *Compton* v. *Ide*, 732 F. 2d 1429 (CA9 1984); *Hunt* v. *American Bank & Trust Co.*, 783 F. 2d 1011 (CA11 1986). It is extremely unlikely that Congress expected anything different. Moreover, had our prior rule been that a federal statute should be borrowed if appropriate, the considerations the Court advances as to why that is the right course here—that it will promote uniformity and avoid litigation, and that there are differences between the federal action and the actions covered by state statutes—would have been sufficient to warrant selection of a federal limitations period for almost any federal statute, a conclusion plainly inconsistent with the results of our cases.[4]

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[4] Even *DelCostello* does not fully support the Court's reformulation in the present opinion. It specifically noted that "our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action" and that it did "not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy." 462 U. S., at 171. It also

Second, as the case before us demonstrates, the new rule involves us in a very different kind of enterprise from that required when we borrow state law. In general, the type of decision we face in the latter context is how to choose among various statutes of limitations, each of which was intended by the state legislature to apply to a whole category of causes of action. Federal statutes of limitations, on the other hand, are almost invariably tied to specific causes of action. The first consequence of this distinction is that in practice the inquiry as to which state statute to select will be very close to the traditional kind of classification question courts deal with all the time. Thus, for example, if a federal statute creates a cause of action that has elements of tort and contract, we may frame the question of which statute to apply as whether it is more "appropriate" to apply the State's tort or contract limitations period. In reality, however, rather than examine whether the policies of the federal statute are better served by one limitations period than the other, we will generally an-

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involved borrowing a federal statute that was arguably applicable by its own terms. *Id.*, at 170. In any event, to the extent our decision here rests on our interpretation of congressional intent, the Court's conclusion in that case that Congress intended § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b), to be borrowed for suits claiming breach of the duty of fair representation tells us nothing as to what Congress intended in enacting RICO.

Because we claimed in *DelCostello* not to have abandoned our prior practice, that decision did not place Congress on notice that henceforth we would interpret its silence as a directive to borrow federal statutes of limitations. Any decision that the lower federal courts, whose regular task involves interpreting our opinions, did not understand to have worked a change in the law, see *supra*, at 167, is certainly not clear enough to form the basis for a presumption that Congress' expectations were transformed. In any event, even if that decision had announced a general change of approach, to which it could be expected that Congress would adapt, it would only be appropriate to make the assumption that it had done so with respect to statutes passed after the decision came down. RICO was passed in 1970, well before our opinion in *DelCostello*. Pub. L. 91–452, 84 Stat. 943, 18 U. S. C. § 1963.

swer that question by determining whether the federal cause of action should be classified as sounding in tort or contract. See, *e. g., Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 662 (1987) (42 U. S. C. § 1981 actions sound in tort); *id.*, at 670 (BRENNAN, J., dissenting) (§ 1981 actions sound in contract). In deciding whether to borrow a federal statute that clearly does not apply by its terms, however, we genuinely will have to determine whether, for example, the Clayton Act's limitations period will better serve the policies underlying civil actions under RICO than the limitations period covering criminal actions under RICO, or whether either will do the job better than state limitations upon actions for economic injury. That seems to me to be quintessentially the kind of judgment to be made by a legislature. See generally *Wilcox* v. *Fitch*, 20 Johns. *472, *475 (N. Y. 1823) (limitations are creatures of statute, and did not exist at common law); *Wall* v. *Robson*, 2 Nott & McCord 498, 499 (S. C. 1820) (same); 2 E. Coke, Institutes 95 (6th ed. 1680).

The second consequence of the generality of state statutes of limitations versus the particularity of federal ones is that in applying a state statute, we do not really have to make a new legislative judgment. The state legislature will already have made the judgment that, for example, in contract actions, a certain balance should be struck between "protecting valid claims . . . [and] prohibiting the prosecution of stale ones." *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 464 (1975). That judgment will have been made in the knowledge that it will apply to a broad range of contractual matters, some of which the legislature has not specifically contemplated. That is not true of a federal statute enacted with reference to a particular cause of action, such as the one for the Clayton Act. The Court is clearly aware of this difficulty. It declines to apply 18 U. S. C. § 3282, the general 5-year criminal statute of limitations, on the ground that it "does not reflect any congressional balancing of the competing equities unique to civil RICO actions." *Ante*, at 156.

That objection should also, however, lead it to reject a 4-year limitations period, which clearly reflects only the balance of equities Congress deemed appropriate to the Clayton Act.

* * *

Thus, while I can accept the reasons the Court gives for refusing to apply state statutes of limitations to the civil RICO claim at issue here, *ante*, at 152–154, they lead me to a very different conclusion from that reached by the Court. I would hold that if state codes do not furnish an "appropriate" limitations period, there is none to apply. Such an approach would promote uniformity as effectively as the borrowing of a federal statute, and would do a better job of avoiding litigation over limitations issues than the Court's approach. That was the view we took in *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U. S. 355 (1977), as to Title VII civil enforcement actions, unmoved by the fear that that conclusion might prove "'"repugnant to the genius of our laws."'" *Ante*, at 156, quoting *Wilson* v. *Garcia*, 471 U. S. 261, 271 (1985), in turn quoting *Adams* v. *Woods*, 2 Cranch 336, 342 (1805).[5] See also 18 U. S. C. § 3281 (no limitations period for federal capital offenses). Indeed, it might even prompt Congress to enact a limitations period that it believes "appropriate," a judgment far more within its competence than ours.

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[5] In *Adams* v. *Woods*, that argument was advanced not as a reason why the Court should apply a clearly inapplicable statute of limitations, but as a reason why it should interpret an arguably ambiguous one to apply to the claim at issue. 2 Cranch, at 341–342.

BOURJAILY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-6725. Argued April 1, 1987—Decided June 23, 1987

In a tape-recorded telephone conversation with a Federal Bureau of Investigation (FBI) informant arranging to sell cocaine, Angelo Lonardo, who had agreed earlier to find individuals to distribute the drug, said he had a "gentleman friend" (petitioner) who had some questions. In a subsequent telephone call, the informant spoke to the "friend" about the drug's quality and the price, and later arranged with Lonardo for the sale to take place in a designated parking lot, where Lonardo would transfer the drug from the informant's car to the "friend." The transaction took place as planned, and the FBI arrested Lonardo and petitioner immediately after Lonardo placed the drug into petitioner's car. At petitioner's trial that resulted in his conviction of federal drug charges, including a conspiracy charge, the Government introduced, over petitioner's objection, Lonardo's telephone statements regarding the "friend's" participation in the transaction. The District Court found that, considering both the events in the parking lot and Lonardo's statements, the Government had established by a preponderance of the evidence that a conspiracy involving Lonardo and petitioner existed, that Lonardo's statements were made in the course and in furtherance of the conspiracy, and that the statements thus satisfied Federal Rule of Evidence 801(d)(2)(E), which provides that a statement is not hearsay if it is made "by a coconspirator of a party during the course and in furtherance of the conspiracy." The Court of Appeals affirmed, agreeing that Lonardo's statements were admissible under the Federal Rules of Evidence, and also rejecting petitioner's contention that, because he could not cross-examine Lonardo (who exercised his right not to testify), admission of the statements violated his Sixth Amendment right to confront the witnesses against him.

Held: Lonardo's out-of-court statements were properly admitted against petitioner. Pp. 175–184.

(a) When the preliminary facts relevant to Rule 801(d)(2)(E)—the existence of a conspiracy and the nonoffering party's involvement in it—are disputed, the offering party must prove them by a preponderance of the evidence, not some higher standard of proof. Rule of Evidence 104(a) requires that the court determine preliminary questions concerning the admissibility of evidence, but the Rules do not define the standard of proof. The traditional requirement that such questions be established by a preponderance of proof, regardless of the burden of proof on the substantive issues, applies here. Pp. 175–176.

(b) There is no merit to petitioner's contention—based on the "bootstrapping rule" of *Glasser* v. *United States*, 315 U. S. 60, and *United States* v. *Nixon*, 418 U. S. 683—that a court, in determining the preliminary facts relevant to Rule 801(d)(2)(E), must look only to independent evidence other than the statements sought to be admitted. Both *Glasser* and *Nixon* were decided before Congress enacted the Federal Rules of Evidence, and Rule 104(a) provides that, in determining preliminary questions concerning admissibility, the court "is not bound by the rules of evidence" (except those with respect to privileges), thus authorizing consideration of hearsay. Such construction of Rule 104(a) does not fundamentally change the nature of the co-conspirator exception to the hearsay rule. Out-of-court statements are only presumed unreliable and may be rebutted by appropriate proof, and individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. Thus, a *per se* rule barring consideration of Lonardo's statements during preliminary factfinding is not required. Each of his statements was corroborated by independent evidence, consisting of the events that transpired at the parking lot. Accordingly, it need not be decided whether, under Rule 104(a), the courts below could have relied solely upon Lonardo's hearsay statements to establish the preliminary facts for admissibility. If *Glasser* and *Nixon* are interpreted as meaning that courts cannot look to the hearsay statements themselves for any purpose, they have been superseded by Rule 104(a). It is sufficient in this case to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted. Pp. 176–181.

(c) Admission of Lonardo's statements against petitioner did not violate his rights under the Confrontation Clause. The requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Clause, and since the statements were admissible under the Rule, there is no constitutional problem. In this context, the Clause, as a general matter, requires the prosecution to demonstrate both the unavailability of the declarant and the indicia of reliability surrounding the out-of-court declaration. However, a showing of unavailability is not required when the hearsay statement is the out-of-court declaration of a co-conspirator. *United States* v. *Inadi*, 475 U. S. 387. Moreover, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception, such as the co-conspirator exception. Pp. 181–184.

781 F. 2d 539, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, POWELL, STEVENS, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 184. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 186.

Stephen Allan Saltzburg argued the cause for petitioner. With him on the briefs were *James R. Willis* and *James M. Shellow*.

Lawrence S. Robbins argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Weld,* and *Deputy Solicitor General Bryson.*[*]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Federal Rule of Evidence 801(d)(2)(E) provides: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." We granted certiorari to answer three questions regarding the admission of statements under Rule 801(d)(2)(E): (1) whether the court must determine by independent evidence that the conspiracy existed and that the defendant and the declarant were members of this conspiracy; (2) the quantum of proof on which such determinations must be based; and (3) whether a court must in each case examine the circumstances of such a statement to determine its reliability. 479 U. S. 881 (1986).

In May 1984, Clarence Greathouse, an informant working for the Federal Bureau of Investigation (FBI), arranged to sell a kilogram of cocaine to Angelo Lonardo. Lonardo agreed that he would find individuals to distribute the drug. When the sale became imminent, Lonardo stated in a tape-recorded telephone conversation that he had a "gentleman friend" who had some questions to ask about the cocaine. In a subsequent telephone call, Greathouse spoke to the "friend" about the quality of the drug and the price. Greathouse then spoke again with Lonardo, and the two arranged the details of the purchase. They agreed that the sale would take place in a designated hotel parking lot, and Lonardo would transfer the drug from Greathouse's car to the "friend," who would be waiting in the parking lot in his own car. Greathouse proceeded with the transaction as planned, and FBI agents arrested Lonardo and petitioner immediately after Lonardo placed a kilogram of cocaine into petitioner's car in the hotel parking lot. In petitioner's car, the agents found over $20,000 in cash.

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[*] *Judy Clarke* and *Mario G. Conte* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Petitioner was charged with conspiring to distribute cocaine, in violation of 21 U. S. C. § 846, and possession of cocaine with intent to distribute, a violation of 21 U. S. C. § 841(a)(1). The Government introduced, over petitioner's objection, Angelo Lonardo's telephone statements regarding the participation of the "friend" in the transaction. The District Court found that, considering the events in the parking lot and Lonardo's statements over the telephone, the Government had established by a preponderance of the evidence that a conspiracy involving Lonardo and petitioner existed, and that Lonardo's statements over the telephone had been made in the course of and in furtherance of the conspiracy. App. 66–75. Accordingly, the trial court held that Lonardo's out-of-court statements satisfied Rule 801(d)(2)(E) and were not hearsay. Petitioner was convicted on both counts and sentenced to 15 years. The United States Court of Appeals for the Sixth Circuit affirmed. 781 F. 2d 539 (1986). The Court of Appeals agreed with the District Court's analysis and conclusion that Lonardo's out-of-court statements were admissible under the Federal Rules of Evidence. The court also rejected petitioner's contention that because he could not cross-examine Lonardo, the admission of these statements violated his constitutional right to confront the witnesses against him. We affirm.

Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the Rule. There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "during the course and in furtherance of the conspiracy." Federal Rule of Evidence 104(a) provides: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court." Petitioner and the Government agree that the existence of a conspiracy and petitioner's involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court. The Federal Rules, however, nowhere define the standard of proof the court must observe in resolving these questions.

We are therefore guided by our prior decisions regarding admissibility determinations that hinge on preliminary factual questions. We have traditionally required that these matters be established by a preponderance of proof. Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations. The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case, see *In re Winship*, 397 U. S. 358 (1970), or a civil case. See generally *Colorado* v. *Connelly*, 479 U. S. 157, 167–169 (1986). The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration. As in *Lego* v. *Twomey*, 404 U. S. 477, 488 (1972), we find "nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard." We think that our previous decisions in this area resolve the matter. See, *e. g.*, *Colorado* v. *Connelly*, *supra* (preliminary fact that custodial confessant waived rights must be proved by preponderance of the evidence); *Nix* v. *Williams*, 467 U. S. 431, 444, n. 5 (1984) (inevitable discovery of illegally seized evidence must be shown to have been more likely than not); *United States* v. *Matlock*, 415 U. S. 164 (1974) (voluntariness of consent to search must be shown by preponderance of the evidence); *Lego* v. *Twomey*, *supra* (voluntariness of confession must be demonstrated by a preponderance of the evidence). Therefore, we hold that when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence.[1]

Even though petitioner agrees that the courts below applied the proper standard of proof with regard to the preliminary facts relevant to Rule 801(d)(2)(E), he nevertheless challenges the admission of Lonardo's statements. Petitioner argues that in determining whether a conspiracy exists and whether the defendant was a member of it, the court must look only to independent evidence—that is, evidence other than the statements sought to be admitted. Petitioner relies on *Glasser* v. *United States*, 315 U. S. 60 (1942), in which this Court first mentioned the so-called "bootstrapping rule." The relevant issue in *Glasser* was whether Glasser's counsel, who also represented another defendant, faced such a conflict of interest that Glasser received ineffective assistance. Glasser contended that conflicting loyalties led his lawyer not to object to statements made by one of Glasser's co-conspirators. The Government argued that any objection would have been fruitless because the statements were admissible. The Court rejected this proposition:

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[1] We intimate no view on the proper standard of proof for questions falling under Federal Rule of Evidence 104(b) (conditional relevancy). We also decline to address the circumstances in which the burden of coming forward to show that the proffered evidence is inadmissible is appropriately placed on the nonoffering party. See E. Cleary, McCormick on Evidence § 53, p. 136, n. 8 (3d ed. 1984). Finally, we do not express an opinion on the proper order of proof that trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial.

> "[S]uch declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. . . . Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Id.*, at 74–75.

The Court revisited the bootstrapping rule in *United States* v. *Nixon*, 418 U. S. 683 (1974), where again, in passing, the Court stated: "Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, *by independent evidence*, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy." *Id.*, at 701, and n. 14 (emphasis added) (footnote omitted). Read in the light most favorable to petitioner, *Glasser* could mean that a court should not consider hearsay statements at all in determining preliminary facts under Rule 801(d)(2)(E). Petitioner, of course, adopts this view of the bootstrapping rule. *Glasser*, however, could also mean that a court must have *some* proof *aliunde*, but may look at the hearsay statements themselves in light of this independent evidence to determine whether a conspiracy has been shown by a preponderance of the evidence. The Courts of Appeals have widely adopted the former view and held that in determining the preliminary facts relevant to co-conspirators' out-of-court statements, a court may not look at the hearsay statements themselves for their evidentiary value.

Both *Glasser* and *Nixon*, however, were decided before Congress enacted the Federal Rules of Evidence in 1975. These Rules now govern the treatment of evidentiary questions in federal courts. Rule 104(a) provides: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges." Similarly, Rule 1101(d)(1) states that the Rules of Evidence (other than with respect to privileges) shall not apply to "[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104." The question thus presented is whether any aspect of *Glasser's* bootstrapping rule remains viable after the enactment of the Federal Rules of Evidence.

Petitioner concedes that Rule 104, on its face, appears to allow the court to make the preliminary factual determinations relevant to Rule 801(d)(2)(E) by considering any evidence it wishes, unhindered by considerations of admissibility. Brief for Petitioner 27. That would seem to many to be the end of the matter. Congress has decided that courts may consider hearsay in making these factual determinations. Out-of-court statements made by anyone, including putative co-conspirators, are often hearsay. Even if they are, they may be considered, *Glasser* and the bootstrapping rule notwithstanding. But petitioner nevertheless argues that the bootstrapping rule, as most Courts of Appeals have construed it, survived this apparently unequivocal change in the law unscathed and that Rule 104, as applied to the admission of co-conspirator's statements, does not mean what it says. We disagree.

Petitioner claims that Congress evidenced no intent to disturb the bootstrapping rule, which was embedded in the previous approach, and we should not find that Congress altered the rule without affirmative evidence so indicating. It would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104. The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. We think that the Rule is sufficiently clear that to the extent that it is inconsistent with petitioner's interpretation of *Glasser* and *Nixon*, the Rule prevails.[2]

Nor do we agree with petitioner that this construction of Rule 104(a) will allow courts to admit hearsay statements without any credible proof of the conspiracy, thus fundamentally changing the nature of the co-conspirator exception. Petitioner starts with the proposition that co-conspirators' out-of-court statements are deemed unreliable and are inadmissible, at least until a conspiracy is shown. Since these statements are unreliable, petitioner contends that they should not form any part of the basis for establishing a conspiracy, the very antecedent that renders them admissible.

Petitioner's theory ignores two simple facts of evidentiary life. First, out-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof. See Fed. Rule Evid. 803(24) (otherwise inadmissible hearsay may be admitted if circumstantial guarantees of trustworthiness demonstrated). Second, individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence. A *per se* rule barring consideration of these hearsay statements during preliminary factfinding is not therefore required. Even if out-of-court declarations by co-conspirators are presumptively unreliable, trial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case. Courts often act as factfinders, and there is no reason to believe that courts are any less able to properly recognize the probative value of evidence in this particular area. The party opposing admission has an adequate incentive to point out the shortcomings in such evidence before the trial court finds the preliminary facts. If the opposing party is unsuccessful in keeping the evidence from the factfinder, he still has the opportunity to attack the probative value of the evidence as it relates to the substantive issue in the case. See, *e. g.*, Fed. Rule Evid. 806 (allowing attack on credibility of out-of-court declarant).

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[2] The Advisory Committee Notes show that the Rule was not adopted in a fit of absentmindedness. The Note to Rule 104 specifically addresses the process by which a federal court should make the factual determinations requisite to a finding of admissibility:

"If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are 'scattered and inconclusive,' and observes:

" 'Should the exclusionary law of evidence, "the child of the jury system" in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear *any relevant evidence*, such as affidavits *or other reliable hearsay.*' " 28 U. S. C. App., p. 681 (emphasis added).

The Advisory Committee further noted: "An item, offered and objected to, *may itself be considered in ruling on admissibility*, though not yet admitted in evidence." *Ibid.* (emphasis added). We think this language makes plain the drafters' intent to abolish any kind of bootstrapping rule. Silence is at best ambiguous, and we decline the invitation to rely on speculation to import ambiguity into what is otherwise a clear rule.

We think that there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy. Petitioner's case presents a paradigm. The out-of-court statements of Lonardo indicated that Lonardo was involved in a conspiracy with a "friend." The statements indicated that the friend had agreed with Lonardo to buy a kilogram of cocaine and to distribute it. The statements also revealed that the friend would be at the hotel parking lot, in his car, and would accept the cocaine from Greathouse's car after Greathouse gave Lonardo the keys. Each one of Lonardo's statements may itself be unreliable, but taken as a whole, the entire conversation between Lonardo and Greathouse was corroborated by independent evidence. The friend, who turned out to be petitioner, showed up at the prearranged spot at the prearranged time. He picked up the cocaine, and a significant sum of money was found in his car. On these facts, the trial court concluded, in our view correctly, that the Government had established the existence of a conspiracy and petitioner's participation in it.

We need not decide in this case whether the courts below could have relied solely upon Lonardo's hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence. To the extent that *Glasser* meant that courts could not look to the hearsay statements themselves for any purpose, it has clearly been superseded by Rule 104(a). It is sufficient for today to hold that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted. As we have held in other cases concerning admissibility determinations, "the judge should receive the evidence and give it such weight as his judgment and experience counsel." *United States* v. *Matlock*, 415 U. S., at 175. The courts below properly considered the statements of Lonardo and the subsequent events in finding that the Government had established by a preponderance of the evidence that Lonardo was involved in a conspiracy with petitioner. We have no reason to believe that the District Court's factfinding of this point was clearly erroneous. We hold that Lonardo's out-of-court statements were properly admitted against petitioner.[3]

We also reject any suggestion that admission of these statements against petitioner violated his rights under the Confrontation Clause of the Sixth Amendment. That Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." At petitioner's trial, Lonardo exercised his right not to testify. Petitioner argued that Lonardo's unavailability rendered the admission of his out-of-court statements unconstitutional since petitioner had no opportunity to confront Lonardo as to these statements. The Court of Appeals held that the requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause, and since the statements were admissible under the Rule, there was no constitutional problem. We agree.

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[3] Given this disposition, we have no occasion to address the Government's argument, Brief for United States 21–25, that Lonardo's statements are admissible independent of Rule 801(d)(2)(E).

While a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as "unintended and too extreme." *Ohio* v. *Roberts*, 448 U. S. 56, 63 (1980). Rather, we have attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements. To accommodate these competing interests, the Court has, as a general matter only, required the prosecution to demonstrate both the unavailability of the declarant and the "indicia of reliability" surrounding the out-of-court declaration. *Id.*, at 65–66. Last Term in *United States* v. *Inadi*, 475 U. S. 387 (1986), we held that the first of these two generalized inquiries, unavailability, was not required when the hearsay statement is the out-of-court declaration of a co-conspirator. Today, we conclude that the second inquiry, independent indicia of reliability, is also not mandated by the Constitution.

The Court's decision in *Ohio* v. *Roberts* laid down only "a general approach to the problem" of reconciling hearsay exceptions with the Confrontation Clause. See 448 U. S., at 65. In fact, *Roberts* itself limits the requirement that a court make a separate inquiry into the reliability of an out-of-court statement. Because "'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' *California* v. *Green*, 399 U. S. [149, 155 (1970)], and 'stem from the same roots,' *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970)," *id.*, at 66, we concluded in *Roberts* that no independent inquiry into reliability is required when the evidence "falls within a firmly rooted hearsay exception." *Ibid.* We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements. Cf. *Dutton* v. *Evans*, 400 U. S. 74 (1970) (reliability inquiry required where evidentiary rule deviates from common-law approach, admitting co-conspirators' hearsay statements made after termination of conspiracy). The admissibility of co-conspirators' statements was first established in this Court over a century and a half ago in *United States* v. *Gooding*, 12 Wheat. 460 (1827) (interpreting statements of co-conspirator as *res gestae* and thus admissible against defendant), and the Court has repeatedly reaffirmed the exception as accepted practice. In fact, two of the most prominent approvals of the rule came in cases that petitioner maintains are still vital today, *Glasser* v. *United States*, 315 U. S. 60 (1942), and *United States* v. *Nixon*, 418 U. S. 683 (1974). To the extent that these cases have not been superseded by the Federal Rules of Evidence, they demonstrate that the co-conspirator exception to the hearsay rule is steeped in our jurisprudence. In *Delaney* v. *United States*, 263 U. S. 586, 590 (1924), the Court rejected the very challenge petitioner brings today, holding that there can be no separate Confrontation Clause challenge to the admission of a co-conspirator's out-of-court statement. In so ruling, the Court relied on established precedent holding such statements competent evidence. We think that these cases demonstrate that co-conspirators' statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion. Accordingly, we hold that the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E).[4]

The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, concurring.

The rule against "bootstrapping" announced in *Glasser* v. *United States*, 315 U. S. 60, 74–75 (1942), has two possible interpretations. The more prevalent interpretation adopted by the Courts of Appeals is that the admissibility of the declaration under the co-conspirator rule must be determined *entirely* by independent evidence. The Court correctly holds that this reading of the *Glasser* rule is foreclosed by the plain language of Rule 104(a) of the Federal Rules of Evidence. That Rule unambiguously authorizes the trial judge to consider the contents of a proffered declaration in determining its admissibility.

I have never been persuaded, however, that this interpretation of the *Glasser* rule is correct. In my view, *Glasser* holds that a declarant's out-of-court statement is inadmissible against his alleged co-conspirators unless there is some corroborating evidence to support the triple conclusion that there was a conspiracy among those defendants, that the declarant was a member of the conspiracy, and that the statement furthered the objectives of the conspiracy. An otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility—it cannot lift itself into admissibility entirely by tugging on its own bootstraps. It may, however, use its own bootstraps, together with other support, to overcome the objection. In the words of the *Glasser* opinion, there must be proof "*aliunde,*" that is, evidence from another source, that together with the contents of the statement satisfies the preliminary conditions for admission of the statement. *Id.*, at 74.[1] This interpretation of *Glasser* as requiring some but not complete proof "*aliunde*" is fully consistent with the plain language of Rule 104(a).[2] If, as I assume they did, the drafters of Rule 104(a) understood the *Glasser* rule as I do, they had no reason to indicate that it would be affected by the new Rule.[3]

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[4] We reject any suggestion that by abolishing the bootstrapping rule, the Federal Rules of Evidence have changed the co-conspirator hearsay exception such that it is no longer "firmly rooted" in our legal tradition. The bootstrapping rule relates only to the *method of proof* that the exception has been satisfied. It does not change any element of the co-conspirator exception, which has remained substantively unchanged since its adoption in this country.

Thus, the absence of any legislative history indicating an intent to change the *Glasser* rule is entirely consistent with the reasoning of the Court's opinion, which I join.

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[1] Glasser had argued that "independently of the statements complained of, there is *no proof* connecting him with the conspiracy." 315 U. S., at 75 (emphasis added).

[2] While the more prevalent interpretation of *Glasser* is that the admissibility of the declaration must be determined entirely by independent evidence, other Courts of Appeals have concluded that Rule 104(a) cut back on *Glasser*, rather than eliminating it completely, and thus preserved its requirement of some proof *aliunde*. As the First Circuit concluded in *United States* v. *Martorano*, 557 F. 2d 1, 12 (1977), cert. denied, 435 U. S. 922 (1978):

"We believe the new rules [of evidence] must be taken as overruling *Glasser* to the extent that it held that the statement seeking admission cannot be considered at all in making the determination whether a conspiracy exists. *Glasser*, however, still stands as a warning to trial judges that such statements should ordinarily be given little weight. Here, *where there is significant independent evidence of the existence of a conspiracy and where the statement seeking admission simply corroborates inferences which can be drawn from the independent evidence*, we see no problem with the consideration of that statement" (emphasis added).

See also *United States* v. *Vinson*, 606 F. 2d 149, 153, n. 8 (CA6 1979), cert. denied, 444 U. S. 1074 (1980); *United States* v. *Enright*, 579 F. 2d 980, 985, n. 4 (CA6 1978).

[3] The Advisory Committee Notes to Rule 104(a) are consistent with my view that some quantum of proof *aliunde* was, and still is, required: "An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence." 28 U. S. C. App., p. 681.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I disagree with the Court in three respects:[1] First, I do not believe that the Federal Rules of Evidence changed the long- and well-settled law to the effect that the preliminary questions of fact, relating to admissibility of a nontestifying co-conspirator's statement, must be established by evidence independent of that statement itself. Second, I disagree with the Court's conclusion that allowing the co-conspirator's statement to be considered in the resolution of these factual questions will remedy problems of the statement's unreliability. In my view, the abandonment of the independent-evidence requirement will lead, instead, to the opposite result. This is because the abandonment will eliminate one of the few safeguards of reliability that this exemption from the hearsay definition possesses. Third, because the Court alters the traditional hearsay exemption—especially an aspect of it that contributes to the reliability of an admitted statement—I do not believe that the Court can rely on the "firmly rooted hearsay exception" rationale, see *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980), to avoid a determination whether any "indicia of reliability" support the co-conspirator's statement, as the Confrontation Clause surely demands.

I

The Court recognizes that, according to the common-law view of the exemption of a co-conspirator's statement from the hearsay definition, an offering party was required to establish, as preliminary factual matters, the existence of a conspiracy and a defendant's participation therein by evidence apart from the co-conspirator's statement. *Ante*, at 177. In the Court's view, this settled law was changed in 1975 by the adoption of the Federal Rules of Evidence, particularly Rules 104(a) and 1101(d)(1). As the Court explains, the plain language of Rule 104(a) allows a trial court to consider any information, including hearsay, in making preliminary factual determinations relating to Rule 801(d)(2)(E). *Ante*, at 177–178. Thus, reasons the Court, under the Rule a trial court should be able to examine the co-conspirator's statement itself in resolving the threshold factual question—whether a conspiracy, to which the defendant belonged, existed. According to the Court, in light of Rule 104(a)'s "plain meaning" there is no need to take the "extraordinary" step of looking to legislative history for confirmation of this meaning. *Ante*, at 178.[2]

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[1] I do agree with the Court that the standard of proof by which an offering party establishes the preliminary facts of Rule 801(d)(2)(E) is the preponderance of the evidence. See *ante*, at 176.

I agree that a federal rule's "plain meaning," when it appears, should not be lightly ignored or dismissed. The inclination to accept what seems to be the immediate reading of a federal rule, however, must be tempered with caution when, as in the case of a Federal Rule of Evidence, the rule's complex interrelations with other rules must be understood before one can resolve a particular interpretive problem. See generally Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908 (1978) ("[T]he answers to all questions that may arise under the Rules may not be found in specific terms in the Rules"). In addition, if the language of a rule plainly appears to address a specific problem, one *naturally* would expect legislative history (if it exists) to confirm this plain meaning. In this case, Rule 104(a) cannot be read apart from Rule 801(d)(2)(E), which was a codification of the common-law exemption of co-conspirator statements from the hearsay definition, an exemption that included the independent-evidence requirement. An examination of the legislative history of Rule 801(d)(2)(E) reveals that neither the drafters nor Congress intended to transform this requirement in any way. In sum, the Court espouses an overly rigid interpretive approach; a more complete analysis casts significant and substantial doubt on the Court's "plain meaning" easy solution.

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[2] The Court casts a cursory glance at this history and purports to find that it supports the Court's interpretation of the Rules in question. See *ante*, at 179, n. 2.

A

In order to understand why the Federal Rules of Evidence adopted without change the common-law co-conspirator exemption from hearsay, and why this adoption signified the Advisory Committee's intent to retain the exemption's independent-evidence requirement, it is useful to review briefly the contours of this exemption as it stood before enactment of the Rules. By all accounts, the exemption was based upon agency principles, the underlying concept being that a conspiracy is a common undertaking where the conspirators are all agents of each other and where the acts and statements of one can be attributed to all. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(E)[01], pp. 801-232 and 801-233 (1985) (Weinstein & Berger); Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1384 (1972) (Davenport). As Judge Learned Hand explained this in a frequently quoted remark:

> "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all." *Van Riper* v. *United States*, 13 F. 2d 961, 967 (CA2), cert. denied *sub nom. Ackerson* v. *United States*, 273 U. S. 702 (1926).

Each of the components of this common-law exemption, in turn, had an agency justification. To fall within the exemption, the co-conspirator's statement had to be made "in furtherance of" the conspiracy, a requirement that arose from the agency rationale that an agent's acts or words could be attributed to his principal only so long as the agent was acting within the scope of his employment. See Levie, Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule, 52 Mich. L. Rev. 1159, 1161 (1954) (Levie); 4 D. Louisell & C. Mueller, Federal Evidence §427, p. 348 (1980) (Louisell & Mueller). The statement also had to be made "during the course of" the conspiracy. This feature necessarily accompanies the "in furtherance of" requirement, for there must be an employment or business relationship in effect between the agent and principal, in accordance with which the agent is acting, for the principal to be bound by his agent's deeds or words. See Levie, 52 Mich. L. Rev., at 1161; 4 Louisell & Mueller 337.

The final feature of the co-conspirator hearsay exemption, the independent-evidence requirement, directly corresponds to the agency concept that an agent's statement cannot be used alone to prove the existence of the agency relationship.

> "Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears *by other evidence* that the making of such statement was within the authority of the agent or, as to persons dealing with the agent, within the apparent authority or other power of the agent" (emphasis added). Restatement (Second) of Agency §285 (1958).

See Levie, 52 Mich. L. Rev., at 1161. The reason behind this concept is that the agent's authority must be traced back to some act or statement by the alleged principal. See 1 F. Mechem, Law of Agency §285, p. 205 (1914).

Thus, unlike many common-law hearsay exceptions, the co-conspirator exemption from hearsay with its agency rationale was not based primarily upon any particular guarantees of reliability or trustworthiness that were intended to ensure the truthfulness of the admitted statement and to compensate for the fact that a party would not have the opportunity to test its veracity by cross-examining the declarant. See Davenport, 85 Harv. L. Rev., at 1384. As such, this exemption was considered to be a "vicarious admission."[3] Although not an admission by a defendant himself, the vicarious admission was a statement imputed to the defendant from the co-conspirator on the basis of their agency relationship. As with all admissions, an "adversary system," rather than a reliability, rationale was used to account for the exemption to the ban on hearsay: it was thought that a party could not complain of the deprivation of the right to cross-examine himself (or another authorized to speak for him) or to advocate his own, or his agent's, untrustworthiness. See E. Cleary, McCormick on Evidence § 262, p. 775 (3d ed. 1984). The co-conspirator "admission" exception was also justified on the ground that the need for this evidence, which was particularly valuable in prosecuting a conspiracy, permitted a somewhat reduced concern for the reliability of the statement.[4] See Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stan. L. Rev. 271, 303 (1975); R. Lempert & S. Saltzburg, A Modern Approach to Evidence 395 (2d ed. 1982) (Lempert & Saltzburg).

Although, under common law, the reliability of the co-conspirator's statement was never the primary ground justifying its admissibility, there was some recognition that this exemption from the hearsay rule had certain guarantees of trustworthiness, albeit limited ones. This justification for the exemption has been explained:

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[3] As explained by Dean McCormick, the "vicarious" or "representative" admission concept was justified by an agency rationale. Such admissions were statements of an agent either expressly authorized by a principal or made within the scope of the agent's authority to speak for the principal. See E. Cleary, McCormick on Evidence § 267, pp. 787–788 (3d ed. 1984). In speaking of these statements, I refer here to those by an agent or co-conspirator that are truly hearsay, *i. e.*, used to prove the truth of the matter asserted—not statements that might be considered to be verbal *acts* of the agency or conspiracy that do not fall within the hearsay category and thus are otherwise admissible. As the above quotation from Judge Learned Hand suggests, this distinction is not always made. See McCormick 792.

[4] In *United States* v. *Inadi*, 475 U. S. 387, 395–396 (1986), the Court recently emphasized the importance of co-conspirator statements for conspiracy prosecutions.

> "Active conspirators are likely to know who the members of the conspiracy are and what they have done. When speaking to advance the conspiracy, they are unlikely to describe non-members as conspirators, and they usually will have no incentive to misdescribe the actions of their fellow members." Lempert & Saltzburg 395.

See also 4 J. Wigmore, Evidence § 1080a, p. 199 (J. Chadbourn rev. 1972) ("[T]he general idea of receiving vicarious admissions, is that where the third person was, at the time of speaking, in *circumstances that gave him substantially the same interest* to know something about the matter in hand as had the now opponent, and the *same motive* to make a statement about it, that person's statements have approximately the same testimonial value as if the now opponent had made them") (emphasis in original). And the components of the exemption were understood to contribute to this reliability. When making a statement "during the course of" and "in furtherance of" a conspiracy, a conspirator could be viewed as speaking from the perspective of all the conspirators in order to achieve the common goals of the conspiracy, not from self-serving motives. See Davenport, 85 Harv. L. Rev., at 1387. In particular, the requirement that a conspiracy be established by independent evidence also is seen to contribute to the reliability issue. Yet that requirement goes not so much to the reliability of the statement itself, as to the reliability of the process of admitting it: a statement cannot be introduced *until* independent evidence shows the defendant to be a member of an existing conspiracy. See *id.*, at 1390 ("Independent evidence of the conspiracy's existence and of the defendant's participation in it may supply inferences as to the reliability of the declaration"); Lempert & Saltzburg 395.

The Federal Rules of Evidence did not alter in any way this common-law exemption to hearsay.[5] The Rules essentially codify the components of this exemption: Rule 801(d)(2)(E) provides that the co-conspirator's statement, to be admissible against a party, must be "by a coconspirator of a party during the course and in furtherance of the conspiracy." Moreover, the exemption was placed within the category of "not hearsay," as an admission, in contrast to the hearsay exceptions of Rules 803 and 804. The Advisory Committee explained that the exclusion of admissions from the hearsay category is justified by the traditional "adversary system" rationale, not by any specific "guarantee of trustworthiness" used to justify hearsay exceptions. See Advisory Committee's Notes on Fed. Rule Evid. 801, 28 U. S. C. App., p. 717, 56 F. R. D. 183, 297 (1972); see also Note, Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay, 53 Ford. L. Rev. 1291, 1295, and n. 25 (1985).

More importantly, by explicitly retaining the agency rationale for the exemption, the Advisory Committee expressed its intention that the exemption would remain identical to the common-law rule and that it would not be expanded in any way. The Advisory Committee recognized that this agency rationale had been subject to criticism.[6] The drafters of the American Law Institute's Model Code of Evidence had gone so far as to abandon the agency justification and had eliminated the "in furtherance of" requirement, observing that "[t]hese statements are likely to be true, and are usually made with a realization that they are against the declarant's interest." Model Code of Evidence, Rule 508(b) commentary, p. 251 (1942). The Advisory Committee, however, declined to accept without reservation a reliability foundation for Rule 801(d)(2)(E).[7]

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[5] In codifying the common-law exemption, the Rules should be understood to adopt the Court's application in *Glasser* v. *United States*, 315 U. S. 60 (1942), of the exemption's independent-evidence requirement. The Court there examined the evidence apart from the co-conspirator's statement to see whether this evidence would establish Glasser's participation in an existing conspiracy. See *id.*, at 75. In light of my understanding of the history of the co-conspirator exemption from hearsay, I thus disagree with Justice Stevens' reading of *Glasser*. See *ante*, at 184–185 (concurring opinion).

[6] In the years prior to the adoption of the Federal Rules, this rationale for justifying the exception for co-conspirator statements was criticized. See, *e. g.*, Levie, 52 Mich. L. Rev., at 1165 (defendant will be unable to

The Advisory Committee thus decided to retain the agency justification, in general, and the "in furtherance of" language, in particular, as a compromise position. It thought that the traditional exemption appropriately balanced the prosecution's need for a co-conspirator's statements and the defendant's need for the protections against unreliable statements, protections provided by the components of the common-law exemption. See 4 Weinstein & Berger ¶ 801(d)(2)(E)[01], p. 801–235. The Advisory Committee, however, expressed its doubts about the agency rationale and, on the basis of these doubts, plainly stated that the exemption should not be changed or extended: "[T]he agency theory of conspiracy is at

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force his "alter ego" co-conspirator to take the stand, in order to examine him as to the statement attributed to the defendant, if the co-conspirator invokes his privilege against self-incrimination); see also Note, 53 Ford. L. Rev., at 1296 and nn. 34 and 35. The Advisory Committee's citation of the Levie article reveals the Committee's awareness of this criticism. See Advisory Committee's Notes on Fed. Rule Evid. 801, 28 U. S. C. App., p. 718, 56 F. R. D. 183, 299 (1972).

[7] The reliability justifications for the common-law exemption also had been subject to criticism in the years before the enactment of the Federal Rules of Evidence. See Levie, 52 Mich. L. Rev., at 1165–1166 ("The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law"); see also Davenport, 85 Harv. L. Rev., at 1384–1391; Note, 53 Ford. L. Rev., at 1296 and n. 36. The Advisory Committee was aware of this criticism, too. See n. 6, *supra*.

best a fiction and ought not to serve as a basis for admissibility beyond that already established." Advisory Committee's Notes on Fed. Rule Evid. 801, 28 U. S. C. App., p. 718, 56 F. R. D., at 299. In light of this intention *not* to alter the common-law exemption, the Advisory Committee's Notes thus make very clear that Rule 801(d)(2)(E) was to include *all* the components of this exemption, including the independent-evidence requirement.[8]

B

Accordingly, when Rule 801(d)(2)(E) and Rule 104(a) are considered together—an examination that the Court neglects to undertake—there appears to be a conflict between the fact that no change in the co-conspirator hearsay exemption was intended by Rule 801(d)(2)(E) and the freedom that Rule 104(a) gives a trial court to rely on hearsay in resolving preliminary factual questions. Although one must be somewhat of an interpretative funambulist to walk between the conflicting demands of these Rules in order to arrive at a resolution that will satisfy their respective concerns, this effort is far to be preferred over accepting the easily available safety "net" of Rule 104(a)'s "plain meaning." The purposes of *both* Rules can be achieved by considering the relevant preliminary factual question for Rule 104(a) analysis to be the following: "whether a conspiracy that included the declarant and the defendant against whom a statement is offered has been demonstrated to exist on the basis of evidence *independent of the declarant's hearsay statements*" (emphasis added). S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 735 (4th ed. 1986). This resolution sufficiently answers Rule 104(a)'s concern with allowing a trial court to consider hearsay in determining preliminary factual questions, because the only hearsay not available for its consideration is the statement at issue. The exclusion of the statement from the preliminary analysis maintains the common-law exemption unchanged.

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[8] The legislative history of Rule 801(d)(2)(E) also confirms that the Rule was intended to make no change in the common-law exemption. See Hearings on Proposed Rules of Evidence before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93d Cong., 1st Sess., 249 (1973) (statement of Chief Judge Henry J. Friendly: "While there is nothing wrong in [801(d)(2)(E)], it says nothing that would help anybody at all. It is just as bare as can be. It does not advance matters a bit"); Hearings on Federal Rules of Evidence before the Senate Committee on the Judiciary, 93d Cong., 2d Sess., 318 (1974) (statement of Herbert Semmel: "Finally, the House bill would not affect the admissibility of statements by defendants, by co-conspirators or by agents of the defendant all of which would be admissible under 801(d)(2)"). In particular, the history indicates that the independent-evidence requirement was understood to be retained in the Rule. *Id.*, at 162 (statement of Richard H. Keatinge and John T. Blanchard: "Rule 801(d)(2)(E) does not appear to disturb the conventional position that the judge must make the preliminary determination of the adequacy of independent evidence of a conspiracy, the nature of the statements and the party's membership in the conspiracy").

As the Court recognizes, *ante*, at 177, in the more than 10 years since the enactment of the Federal Rules of Evidence, the Courts of Appeals, almost uniformly, have found no conflict between Rule 104(a) and the independent-evidence requirement understood to adhere in Rule 801(d)(2)(E).[9] Indeed, some courts have rejected the suggestion that Rule 104(a) has changed this component of the common-law exemption, because, like the Advisory Committee, they recognize the incremental protection against unreliable statements that this requirement gives to defendants. See, *e. g.*, *United States* v. *Bell*, 573 F. 2d 1040, 1044 (CA8 1978). Yet the Court cavalierly disregards these years of interpretative experience, as well as the rich history of this exemption, and arrives at its conclusion solely on the basis of its "plain meaning" approach.

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[9] Besides the Court of Appeals for the Sixth Circuit, only the Court of Appeals for the First Circuit has accepted the argument that Rule 104(a) permits consideration of the co-conspirator's statement in determining the existence of a conspiracy. See *United States* v. *Martorano*, 557 F. 2d 1, and, on rehearing, 561 F. 2d 406 (1977), cert. denied, 435 U. S. 922 (1978). The First Circuit, however, qualifies its deviation from the traditional rule. See 561 F. 2d, at 408 ("But under any view of the law we would, as we said in our original opinion, require significant independent evidence of the existence of the conspiracy, deviating from the *Glasser* practice only to the extent of permitting the district court to consider the independent evidence in the light of the color shed upon it by the highly trustworthy and reliable portions of the hearsay utterance seeking admission"). Several courts have rejected explicitly this inroad into the common-law exception. See, *e. g.*, *United States* v. *James*, 590 F. 2d 575, 581 (CA5) (en banc), cert. denied, 442 U. S. 917 (1979); *United States* v. *Bell*, 573 F. 2d 1040, 1044 (CA8 1978); *In re Japanese Electronic Products*

II

The Court's second argument in favor of abandonment of the independent-evidence rule might best be characterized as an attempt at pragmatic or "real world" analysis. The Court suggests that, while a co-conspirator's statement might be presumed unreliable when considered in isolation, it loses this unreliability when examined together with other evidence of the conspiracy and the defendant's participation in it. *Ante*, at 179–180. In the Court's view, such a consideration of the statement will reveal its probative value, as the facts of this case demonstrate. Proceeding in this "real world" vein, the Court believes that the trial court is capable of detecting any remaining unreliability in the co-conspirator's statement and that the defendant is afforded the opportunity to point

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Antitrust Litigation, 723 F. 2d 238, 261 (CA3 1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986). Other courts continue to adhere to the traditional rule. See *United States* v. *DeFillipo*, 590 F. 2d 1228, 1236, and n. 12 (CA2), cert. denied, 442 U. S. 920 (1979); *United States* v. *Portsmouth Paving Corp.*, 694 F. 2d 312, 320 (CA4 1982); *United States* v. *Rabb*, 752 F. 2d 1320, 1325 (CA9 1984), cert. denied, 471 U. S. 1019 (1985); *United States* v. *Austin*, 786 F. 2d 986, 989–990 (CA10 1986). Still other courts, while noting the apparent conflict between Rule 104(a) and the independent-evidence requirement, have not passed on the issue. See *United States* v. *Jackson*, 201 U. S. App. D. C. 212, 229, n. 34, 627 F. 2d 1198, 1215, n. 34 (1980); *United States* v. *Santiago*, 582 F. 2d 1128, 1133, n. 11 (CA7 1978).

out any shortcomings of the out-of-court statement. *Ante*, at 180.

I, too, prefer an approach that includes a realistic view of problems that come before the Court. See, *e. g.*, *Lee* v. *Illinois*, 476 U. S. 530, 547–548 (1986) (dissenting opinion). I am inclined, however, to remain with the traditional exemption that has been shaped by years of "real world" experience with the use of co-conspirator statements in trials and by a frank recognition of the possible unreliability of these statements.

As explained above, despite the recognized need by prosecutors for co-conspirator statements, these statements often have been considered to be somewhat unreliable. It has long been understood that such statements in some cases may constitute, at best, nothing more than the "idle chatter" of a declarant or, at worst, malicious gossip. See 4 Weinstein & Berger ¶801(d)(2)(E)[01], p. 801–235. Moreover, when confronted with such a statement, an innocent defendant would have a difficult time defending himself against it, for, if he were not in the conspiracy, he would have no idea why the conspirator made the statement. See *United States* v. *Stipe*, 517 F. Supp. 867, 871 (WD Okla.), aff'd, 653 F. 2d 446 (CA10 1981) ("The dangers that an accused may be confronted with numerous statements made by someone else which he never authorized, intended, or even knew about . . . cannot be ignored"). Even an experienced trial judge might credit an incriminatory statement that a defendant could not explain, precisely because the defendant had no ready explanation for it. Because of this actual "real world" experience with the possible unreliability of these statements, the Advisory Committee retained the agency rationale for this exemption in Rule 801(d)(2)(E), as well as the safeguards, albeit limited, against unreliability that this rationale provided the defendant. The independent-evidence requirement was one such safeguard.

If this requirement is set aside, then one of the exemption's safeguards is lost. From a "real world" perspective, I do not believe that considering the statement together with the independent evidence will cure this loss. Contrary to the Court's suggestion, the situation in which a trial court now commonly will rely on the co-conspirator's statement to establish the existence of a conspiracy in which the defendant participated will not be limited to instances in which the statement constitutes just another "piece of evidence," to be considered as no more important than the independent evidence. Rather, such a statement will serve the greatest purpose, and thus will be introduced most frequently, in situations where *all* the other evidence that the prosecution can muster to show the existence of a conspiracy will *not* be adequate. In this situation, despite the use of hearsay admissible under other exceptions and the defendant's and other conspirators' actions, the co-conspirator's statement will be necessary to satisfy the trial court by a preponderance of the evidence that the defendant was a member of an existing conspiracy. Accordingly, the statement will likely *control* the interpretation of whatever other evidence exists and could well transform a series of innocuous actions by a defendant into evidence that he was participating in a criminal conspiracy. This is what "bootstrapping" is all about. Thus, the Court removes one reliability safeguard from an exemption, even though the situation in which a co-conspirator's statement will be used to resolve the preliminary factual questions is that in which the court will rely *most* on the statement.

It is at least heartening, however, to see that the Court reserves the question whether a co-conspirator's statement alone, without *any* independent evidence, could establish the existence of a conspiracy and a defendant's participation in it. *Ante*, at 181; see also *ante*, at 184 (STEVENS, J., concurring). I have no doubt that, in this ultimate example of "bootstrapping," the statement could not pass the preliminary factual test for its own admissibility, even under the

Court's reformulation. For the presumptively unreliable statement would have no corroborative independent evidence that would bring out its probative value. See *ante*, at 179–180. If the statement alone could establish its own foundation for admissibility, a defendant could be convicted of conspiracy on the basis of an unsupported remark by an alleged conspirator—a result that surely the Court could not countenance and that completely cuts the exception adrift from its agency mooring.[10]

III

The Court answers today a question left open in *United States* v. *Inadi*, 475 U. S. 387 (1986). There, while observing that the Confrontation Clause usually required the production of a declarant or a showing of his unavailability so that his out-of-court statement could be admitted against a defendant, the Court concluded that this requirement was not constitutionally mandated in the case of a nontestifying co-conspirator's statement admitted under Rule 801(d)(2)(E). 475 U. S., at 400. The Court in *Inadi* did not have occasion to reach the issue of the reliability of such statements for Confrontation Clause purposes, and said so specifically. *Id.*, at 391, n. 3. Today, the Court concludes that the Constitution does not require any independent "indicia of reliability" for such statements. See *ante*, at 182. Relying upon *Ohio* v. *Roberts*, 448 U. S. 56 (1980), the Court reasons that no such "indicia" are needed to satisfy Confrontation Clause concerns, because the admissibility of these statements "'falls within a firmly rooted hearsay exception.'" *Ante*, at 183, quoting *Ohio* v. *Roberts*, *supra*, at 66. In a footnote, the Court dismisses any suggestion that it is altering the co-

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[10] Because in this case the District Court did not consider whether, excluding Lonardo's out-of-court statements, there was enough independent evidence to establish petitioner's participation in the conspiracy, I would remand the case for a resolution of the preliminary factual questions on the basis of an evaluation of this evidence under the common-law standard as adopted by Rule 801(d)(2)(E).

conspirator hearsay exemption: in its view, the exemption essentially remains the same, and what has changed is merely a "method of proof." *Ante*, at 184, n. 4 (emphasis omitted).

In *Roberts* the Court did observe that, for Confrontation Clause purposes, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U. S., at 66. To understand the significance of this statement, however, it is important to remember why hearsay exceptions satisfy the reliability concern of that Clause. The Court in *Roberts* explained that "accuracy in the factfinding process" is a central concern of the Confrontation Clause that cross-examination normally serves. *Id.*, at 65. This concern is sometimes satisfied when evidence is admitted under a hearsay exception, even where no cross-examination of the declarant occurs at trial. This is because "'hearsay rules and the Confrontation Clause are generally designed to protect similar values,'" *id.*, at 66, quoting *California* v. *Green*, 399 U. S. 149, 155 (1970), and because, with respect to a particular hearsay exception, there are adequate "indicia of reliability" of the out-of-court statement. These indicia serve to guarantee the trustworthiness of the declarant's statement and thus promote the accuracy of the trial—a function otherwise fulfilled by cross-examination. Thus, to answer the Confrontation Clause's concern for reliability with respect to a particular hearsay exception, one must examine what, if any, "indicia of reliability" it possesses. In addition, one must also see how "firmly rooted" the exception is, which suggests that, through experience in its use, the exception has proved to promote the "accuracy of the factfinding process." See generally Note, 53 Ford. L. Rev., at 1306–1307.

The weakness of the Court's assertion—that the Confrontation Clause concern about reliability vanishes because Rule 801(d)(2)(E)'s exemption of a co-conspirator's statement from the hearsay definition is a "firmly rooted hearsay exception"—thus becomes immediately apparent. First, as has been explained and as its inclusion under the admissions rubric would indicate, this exemption has never been justified primarily upon reliability or trustworthiness grounds and its reliability safeguards are not extensive. See also Note, 53 Ford. L. Rev., at 1311–1312. Thus, it is surprising that, without any hesitation, the Court in this case turns to the "firmly rooted hearsay exception" rationale, which is based upon a confidence in adequate "indicia of reliability."

Second, and more astounding, is the Court's reliance upon the "firmly rooted hearsay exception" rationale as it simultaneously removes from the exemption one of the few safeguards against unreliability that it possesses. The Court cannot at all escape from this contradiction by dismissing its alteration of the exception as simply a change in "method of proof." Because the "firmly rooted hearsay exception" is defined in terms of its "indicia of reliability" for Confrontation Clause purposes, a removal of one of these "indicia" significantly transforms the co-conspirator exemption in a relevant respect. In addition, this change takes away from the exemption any weight that experience with its use by courts may have given it, thus undermining its "firmly rooted" status. In sum, the Court cannot have it both ways: it cannot transform the exemption, as it admittedly does, *and* then avoid Confrontation Clause concerns by conjuring up the "firmly rooted hearsay exception" as some benign genie who will extricate the Court from its inconsistent analysis.

With such a transformation in the co-conspirator hearsay exemption having been made, the Court's reliance upon *Roberts'* language concerning the "firmly rooted hearsay exception" is utterly misplaced. Rather, the pertinent language from *Roberts* becomes the sentence following the one quoted by the Court: "In other cases [where there is no "firmly rooted hearsay exception"], the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U. S., at 66. This showing, I believe, would involve an examination of the statement in terms of the factors outlined in *Dutton* v. *Evans*, 400 U. S. 74, 88–89 (1970) (plurality opinion); see also Note, 53 Ford. L. Rev., at 1302. Intellectual honesty thus demands, at the very least, that, having changed this hearsay exemption, the Court remand the case to allow the lower courts to explore any "particularized guarantees of trustworthiness" the statement might have.[11]

I respectfully dissent.

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[11] Petitioner argues that, were the co-conspirator exemption to remain unaltered with respect to the independent-evidence rule, the exemption would satisfy the Confrontation Clause's concern for adequate "indicia of reliability," except in special cases where the defendant could show that the co-conspirator's statement was unusually unreliable and was crucial to the prosecution's case. Brief for Petitioner 33–39. Given the fact that the reliability foundation of this exemption is not as strong as that for traditional hearsay exceptions, I am inclined to agree that the Confrontation Clause might well demand a particularized reliability analysis in cases where a statement is a significant part of the prosecution's case, before such statements could be admitted over a defendant's objection. See Note, 53 Ford. L. Rev., at 1327 (arguing that such statements should not be admitted when declarant is unavailable, even when there is independent evidence of conspiracy, if statements are "crucial to the prosecutor's case or devastatingly prejudicial to the defendant"); see also Davenport, 85 Harv. L. Rev., at 1401–1404 (describing rules of admissibility of co-conspirator's statements in order to satisfy Confrontation Clause concerns). The Court's removal of the requirement of a showing of unavailability of the declarant for the admissibility of such statements in *United States* v. *Inadi*, 475 U. S. 387 (1986), which effectively could prevent a defendant from cross-examining the declarant, increases the importance of the reliability prong of Confrontation Clause analysis.

SOUTH DAKOTA *v.* DOLE, SECRETARY OF TRANSPORTATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86-260. Argued April 28, 1987—Decided June 23, 1987

Title 23 U. S. C. § 158 (1982 ed., Supp. III) directs the Secretary of Transportation to withhold a percentage of otherwise allocable federal highway funds from States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." South Dakota, which permits persons 19 years old or older to purchase beer containing up to 3.2% alcohol, sued in Federal District Court for a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power under Art. I, § 8, cl. 1, of the Constitution and violates the Twenty-first Amendment. The District Court rejected the State's claims, and the Court of Appeals affirmed.

Held: Even if Congress, in view of the Twenty-first Amendment, might lack the power to impose directly a national minimum drinking age (a question not decided here), § 158's indirect encouragement of state action to obtain uniformity in the States' drinking ages is a valid use of the spending power. Pp. 206–212.

(a) Incident to the spending power, Congress may attach conditions on the receipt of federal funds. However, exercise of the power is subject to certain restrictions, including that it must be in pursuit of "the general welfare." Section 158 is consistent with such restriction, since the means chosen by Congress to address a dangerous situation—the interstate problem resulting from the incentive, created by differing state drinking ages, for young persons to combine drinking and driving—were reasonably calculated to advance the general welfare. Section 158 also is consistent with the spending power restrictions that, if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation; and that conditions on federal grants must be related to a national concern (safe interstate travel here). Pp. 206–209.

(b) Nor is § 158 invalidated by the spending power limitation that the conditional grant of federal funds must not be independently barred by other constitutional provisions (the Twenty-first Amendment here). Such limitation is not a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly, but, instead, means that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Here, if South Dakota were to succumb to Congress' blandishments and raise its drinking age to 21, its action would not violate anyone's constitutional rights. Moreover, the relatively small financial inducement offered by Congress here—resulting from the State's loss of only 5% of federal funds otherwise obtainable under certain highway grant programs—is not so coercive as to pass the point at which pressure turns into compulsion. Pp. 209–212.

791 F. 2d 628, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and SCALIA, JJ., joined. BRENNAN, J., *post*, p. 212, and O'CONNOR, J., *post*, p. 212, filed dissenting opinions.

Roger A. Tellinghuisen, Attorney General of South Dakota, argued the cause for petitioner. With him on the briefs was *Craig M. Eichstadt*, Assistant Attorney General.

Deputy Solicitor General Cohen argued the cause for respondent. With him on the brief were *Solicitor General Fried, Assistant Attorney General Willard, Andrew J. Pincus, Leonard Schaitman*, and *Robert V. Zener*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Colorado et al. by *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *William Damsel* and *Shawn H. Nau*, Assistant Attorneys General, *Joel S. Taylor*, and *Nancy J. Miller*, joined by the Attorneys General for their respective States as follows: *Duane Woodard* of Colorado, *Warren Price III* of Hawaii, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Mike Greely* of Montana, *T. Travis Medlock* of South Carolina, *W. J. Michael Cody* of Tennessee, *Jeffrey L. Amestoy* of Vermont, and *Joseph B. Meyer* of Wyoming; for the Mountain States Legal Foundation et al. by *Hal Stratton*, Attorney General of New Mexico, *Constance E. Brooks*, and *Casey Shpall;* for the National Conference of State Legislatures et al. by *Benna Ruth Solomon, Beate Bloch*, and *Larry L. Simms;* for the National Beer Wholesalers' Association et al. by *E. Barrett Prettyman, Jr., John G. Roberts, Jr.*, and *John F. Stasiowski;* and for Phillip J. MacDonnell et al. by *Morton Siegel, Michael A. Moses, Richard G. Schoenstadt*, and *James L. Webster*.

Briefs of *amici curiae* urging affirmance were filed for the Insurance Institute for Highway Safety et al. by *Andrew R. Hricko, Michele McDow-*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner South Dakota permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. S. D. Codified Laws § 35-6-27 (1986). In 1984 Congress enacted 23 U. S. C. § 158 (1982 ed., Supp. III), which directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." The State sued in United States District Court seeking a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power and violates the Twenty-first Amendment to the United States Constitution. The District Court rejected the State's claims, and the Court of Appeals for the Eighth Circuit affirmed. 791 F. 2d 628 (1986).

In this Court, the parties direct most of their efforts to defining the proper scope of the Twenty-first Amendment. Relying on our statement in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 110 (1980), that the "Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," South Dakota asserts that the setting of minimum drinking ages is clearly within the "core powers" reserved to the States under § 2 of the Amendment.[1] Brief for Petitioner 43-44. Section 158, petitioner claims, usurps

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ell Fields, and *Ronald G. Precup;* for the National Council on Alcoholism et al. by *Charles R. Walker III;* for the National Safety Council by *Harry N. Rosenfield;* and for United States Senator Frank R. Lautenberg et al. by *Thomas F. Campion* and *Michael J. Faigen.*

[1] Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

that core power. The Secretary in response asserts that the Twenty-first Amendment is simply not implicated by § 158; the plain language of § 2 confirms the States' broad power to impose restrictions on the sale and distribution of alcoholic beverages but does not confer on them any power to *permit* sales that Congress seeks to *prohibit*. Brief for Respondent 25–26. That Amendment, under this reasoning, would not prevent Congress from affirmatively enacting a national minimum drinking age more restrictive than that provided by the various state laws; and it would follow *a fortiori* that the indirect inducement involved here is compatible with the Twenty-first Amendment.

These arguments present questions of the meaning of the Twenty-first Amendment, the bounds of which have escaped precise definition. *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 274–276 (1984); *Craig* v. *Boren*, 429 U. S. 190, 206 (1976). Despite the extended treatment of the question by the parties, however, we need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove* v. *Klutznick*, 448 U. S. 448, 474 (1980) (opinion of Burger, C. J.). See *Lau* v. *Nichols*, 414 U. S. 563, 569 (1974); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U. S. 275, 295 (1958); *Oklahoma*

v. *Civil Service Comm'n*, 330 U. S. 127, 143–144 (1947); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937). The breadth of this power was made clear in *United States* v. *Butler*, 297 U. S. 1, 66 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," *id.*, at 65, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

The spending power is of course not unlimited, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17, and n. 13 (1981), but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." See *Helvering* v. *Davis*, 301 U. S. 619, 640–641 (1937); *United States* v. *Butler*, *supra*, at 65. In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *Helvering* v. *Davis*, *supra*, at 640, 645.[2] Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital* v. *Halderman*, *supra*, at 17. Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts* v. *United States*, 435 U. S. 444, 461

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[2] The level of deference to the congressional decision is such that the Court has more recently questioned whether "general welfare" is a judicially enforceable restriction at all. See *Buckley* v. *Valeo*, 424 U. S. 1, 90–91 (1976) *(per curiam)*.

(1978) (plurality opinion). See also *Ivanhoe Irrigation Dist.* v. *McCracken, supra,* at 295, ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U. S. 256, 269–270 (1985); *Buckley* v. *Valeo*, 424 U. S. 1, 91 (1976) *(per curiam); King* v. *Smith*, 392 U. S. 309, 333, n. 34 (1968).

South Dakota does not seriously claim that § 158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that "the concept of welfare or the opposite is shaped by Congress . . . ." *Helvering* v. *Davis, supra,* at 645. Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. See 23 U. S. C. § 158 (1982 ed., Supp. III). And the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it "has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment." Brief for Petitioner 52. Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel. See 23 U. S. C. § 101(b).[3]

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[3] Our cases have not required that we define the outer bounds of the "germaneness" or "relatedness" limitation on the imposition of conditions under the spending power. *Amici* urge that we take this occasion to establish that a condition on federal funds is legitimate only if it relates di-

This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created "an incentive to drink and drive" because "young persons commut[e] to border States where the drinking age is lower." Presidential Commission on Drunk Driving, Final Report 11 (1983). By enacting § 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

The remaining question about the validity of § 158—and the basic point of disagreement between the parties—is whether the Twenty-first Amendment constitutes an "independent constitutional bar" to the conditional grant of federal funds. *Lawrence County* v. *Lead-Deadwood School Dist., supra,* at 269–270. Petitioner, relying on its view that the Twenty-first Amendment prohibits *direct* regulation of drinking ages by Congress, asserts that "Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment." Brief for Petitioner 52–53. But our cases show that this "independent constitutional bar" limitation on the spending power is not of the kind petitioner suggests. *United States* v. *Butler, supra,* at 66, for example, established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.

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rectly to the purpose of the expenditure to which it is attached. See Brief for National Conference of State Legislatures et al. as *Amici Curiae* 10. Because petitioner has not sought such a restriction, see Tr. of Oral Arg. 19–21, and because we find any such limitation on conditional federal grants satisfied in this case in any event, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power.

We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants. In *Oklahoma* v. *Civil Service Comm'n*, 330 U. S. 127 (1947), the Court considered the validity of the Hatch Act insofar as it was applied to political activities of state officials whose employment was financed in whole or in part with federal funds. The State contended that an order under this provision to withhold certain federal funds unless a state official was removed invaded its sovereignty in violation of the Tenth Amendment. Though finding that "the United States is not concerned with, and has no power to regulate, local political activities as such of state officials," the Court nevertheless held that the Federal Government "does have power to fix the terms upon which its money allotments to states shall be disbursed." *Id.*, at 143. The Court found no violation of the State's sovereignty because the State could, and did, adopt "the 'simple expedient' of not yielding to what she urges is federal coercion. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." *Id.*, at 143–144 (citation omitted). See also *Steward Machine Co.* v. *Davis*, 301 U. S., at 595 ("There is only a condition which the state is free at pleasure to disregard or to fulfill"); *Massachusetts* v. *Mellon*, 262 U. S. 447, 482 (1923).

These cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." *Steward Machine Co.* v. *Davis*, *supra*, at 590. Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. As we said a half century ago in *Steward Machine Co.* v. *Davis:*

> "[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." 301 U. S., at 589–590.

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BRENNAN, dissenting.

I agree with JUSTICE O'CONNOR that regulation of the minimum age of purchasers of liquor falls squarely within the ambit of those powers reserved to the States by the Twenty-first Amendment. See *post*, at 218. Since States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right. The Amendment, itself, strikes the proper balance between federal and state authority. I therefore dissent.

JUSTICE O'CONNOR, dissenting.

The Court today upholds the National Minimum Drinking Age Amendment, 23 U. S. C. § 158 (1982 ed., Supp. III), as a valid exercise of the spending power conferred by Article I, § 8. But § 158 is not a condition on spending reasonably related to the expenditure of federal funds and cannot be justified on that ground. Rather, it is an attempt to regulate the sale of liquor, an attempt that lies outside Congress' power to regulate commerce because it falls within the ambit of § 2 of the Twenty-first Amendment.

My disagreement with the Court is relatively narrow on the spending power issue: it is a disagreement about the application of a principle rather than a disagreement on the principle itself. I agree with the Court that Congress may attach conditions on the receipt of federal funds to further "the federal interest in particular national projects or programs." *Massachusetts* v. *United States*, 435 U. S. 444, 461 (1978); see *Oklahoma* v. *Civil Service Comm'n*, 330 U. S. 127, 143–144 (1947); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937). I also subscribe to the established proposition that the reach of the spending power "is not limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler*, 297 U. S. 1, 66 (1936). Finally, I agree that there are four separate types of limitations on the spending power: the expenditure must be for the general welfare, *Helvering* v. *Davis*, 301 U. S. 619, 640–641 (1937), the conditions imposed must be unambiguous, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981), they must be reasonably related to the purpose of the expenditure, *Massachusetts* v. *United States*, *supra*, at 461, and the legislation may not violate any independent constitutional prohibition, *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U. S. 256, 269–270 (1985). *Ante*, at 207–208. Insofar as two of those limitations are concerned, the Court is clearly correct that § 158 is wholly unobjectionable. Establishment of a national minimum drinking age certainly fits within the broad concept of the general welfare and the statute is entirely unambiguous. I am also willing to assume, *arguendo*, that the Twenty-first Amendment does not constitute an "independent constitutional bar" to a spending condition. See *ante*, at 209–211.

But the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program. *Massachusetts* v. *United States*, *supra*, at 461; *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U. S. 275, 295 (1958) (the United States may impose "reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"); *Steward Machine Co.* v. *Davis*, *supra*, at 590 ("We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power"). In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.

In support of its contrary conclusion, the Court relies on a supposed concession by counsel for South Dakota that the State "has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment." Brief for Petitioner 52. In the absence of the Twenty-first Amendment, however, there is a strong argument that the Congress might regulate the conditions under which liquor is sold under the commerce power, just as it regulates the sale of many other commodities that are in or affect interstate commerce. The fact that the Twenty-first Amendment is crucial to the State's argument does not, therefore, amount to a concession that the condition imposed by § 158 is reasonably related to highway construction. The Court also relies on a portion of the argument transcript in support of its claim that South Dakota conceded the reasonable relationship point. *Ante*, at 208–209, n. 3, citing Tr. of Oral Arg. 19–21. But counsel's statements there are at best ambiguous. Counsel essentially said no more than that he was not prepared to argue the reasonable relationship question discussed at length in the Brief for the National Conference of State Legislatures et al. as *Amici Curiae*.

Aside from these "concessions" by counsel, the Court asserts the reasonableness of the relationship between the supposed purpose of the expenditure—"safe interstate travel"—and the drinking age condition. *Ante*, at 208. The Court reasons that Congress wishes that the roads it builds may be used safely, that drunken drivers threaten highway safety, and that young people are more likely to drive while under the influence of alcohol under existing law than would be the case if there were a uniform national drinking age of 21. It hardly needs saying, however, that if the purpose of § 158 is to deter drunken driving, it is far too over- and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation. See, *e. g.*, 130 Cong. Rec. 18648 (1984) (remarks of Sen. Humphrey) ("Eighty-four percent of all highway fatalities involving alcohol occur among those whose ages exceed 21"); *id.*, at 18651 (remarks of Sen. McClure) ("Certainly, statistically, if you use that one set of statistics, then the mandatory drinking age ought to be raised at least to 30"); *ibid.* (remarks of Sen. Symms) ("[M]ost of the studies point out that the drivers of age 21–24 are the worst offenders").

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways—or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports § 158. Cf. Tr. of Oral Arg. 39 (counsel for the United States conceding that to condition a grant upon adoption of a unicameral legislature would violate the "germaneness" requirement).

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the Brief for the National Conference of State Legislatures et al. as *Amici Curiae:*

> "Congress has the power to *spend* for the general welfare, it has the power to *legislate* only for delegated purposes. . . .
>
> "The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers." *Id.*, at 19–20.

This approach harks back to *United States* v. *Butler*, 297 U. S. 1 (1936), the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause. There the Court wrote that "[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." *Id.*, at 73. The *Butler* Court saw the Agricultural Adjustment Act for what it was—an exercise of regulatory, not spending, power. The error in *Butler* was not the Court's conclusion that the Act was essentially regulatory, but rather its crabbed view of the extent of Congress' regulatory power under the Commerce Clause. The Agricultural Adjustment Act was regulatory but it was regulation that today would likely be considered within Congress' commerce power. See, *e. g., Katzenbach* v. *McClung*, 379 U. S. 294 (1964); *Wickard* v. *Filburn*, 317 U. S. 111 (1942).

While *Butler*'s authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, its discussion of the spending power and its description of both the power's breadth and its limitations remain sound. The Court's decision in *Butler* also properly recognizes the gravity of the task of appropriately limiting the spending power. If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." *United States* v. *Butler*, *supra*, at 78. This, of course, as *Butler* held, was not the Framers' plan and it is not the meaning of the Spending Clause.

Our later cases are consistent with the notion that, under the spending power, the Congress may only condition grants in ways that can fairly be said to be related to the expenditure of federal funds. For example, in *Oklahoma* v. *CSC*, 330 U. S. 127 (1947), the Court upheld application of the Hatch Act to a member of the Oklahoma State Highway Commission who was employed in connection with an activity financed in part by loans and grants from a federal agency. This condition is appropriately viewed as a condition relating to how federal moneys were to be expended. Other conditions that have been upheld by the Court may be viewed as independently justified under some regulatory power of the Congress. Thus, in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), the Court upheld a condition on federal grants that 10% of the money be "set aside" for contracts with minority business enterprises. But the Court found that the condition could be justified as a valid regulation under the commerce power and § 5 of the Fourteenth Amendment. *Id.*, at 476, 478. See also *Lau* v. *Nichols*, 414 U. S. 563 (1974) (upholding nondiscrimination provisions applied to local schools receiving federal funds).

This case, however, falls into neither class. As discussed above, a condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.

Of the other possible sources of congressional authority for regulating the sale of liquor only the commerce power comes to mind. But in my view, the regulation of the age of the purchasers of liquor, just as the regulation of the price at which liquor may be sold, falls squarely within the scope of those powers reserved to the States by the Twenty-first Amendment. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 716 (1984). As I emphasized in *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335, 356 (1987) (dissenting opinion):

> "The history of the Amendment strongly supports Justice Black's view that the Twenty-first Amendment was intended to return absolute control of the liquor trade to the States, and that the Federal Government could not use its Commerce Clause powers to interfere in any manner with the States' exercise of the power conferred by the Amendment."

Accordingly, Congress simply lacks power under the Commerce Clause to displace state regulation of this kind. *Ibid.*

The immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819). Because 23 U. S. C. § 158 (1982 ed., Supp. III) cannot be justified as an exercise of any power delegated to the Congress, it is not authorized by the Constitution. The Court errs in holding it to be the law of the land, and I respectfully dissent.

PUERTO RICO *v.* BRANSTAD, GOVERNOR OF IOWA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-2116. Argued March 30, 1987—Decided June 23, 1987

Respondent Ronald Calder, who had been released on bail after being arraigned in a Puerto Rico court on felony charges, was declared a fugitive from justice when he failed to appear at a preliminary hearing. Believing that Calder had returned to his family's home in Iowa, Puerto Rico officials notified local authorities in Iowa, and Calder surrendered. The Governor of Puerto Rico submitted to the Governor of Iowa a request for Calder's extradition. After a hearing conducted by the Governor's counsel, and after unsuccessful negotiations between officials of the two jurisdictions for a reduction of the charges against Calder, Iowa's Governor denied the extradition request. Puerto Rico then filed suit in Federal District Court, seeking mandamus relief and a declaration that failure to deliver Calder upon presentation of proper extradition papers violated the Extradition Clause of the Federal Constitution and the Extradition Act. The court dismissed the complaint on the ground that the action was barred by the holding in *Kentucky* v. *Dennison*, 24 How. 66, that federal courts have no power to order a Governor to fulfill the State's obligation under the Extradition Clause to deliver up fugitives from justice. The Court of Appeals affirmed.

Held:

1. *Dennison*'s holding that the federal courts have no authority under the Constitution to compel performance by an asylum State of the mandatory, ministerial duty to deliver up fugitives upon proper demand can stand no longer. Pp. 224-229.

(a) When *Dennison* was decided in 1861, the practical power of the Federal Government was at its lowest ebb since the adoption of the Constitution. Secession of States from the Union was a fact, and civil war was a threatening possibility. Pp. 224-225.

(b) The other proposition for which *Dennison* stands—that the Extradition Clause's commands are mandatory and afford no discretion to executive officers of the asylum State—is reaffirmed. However, the *Dennison* holding as to the federal courts' authority to enforce the Extradition Clause rested on a fundamental premise—that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—which is not representative of current law. It has long been a settled principle that federal courts may enjoin unconstitutional action by state officials. Considered *de novo*, there is no justification for distinguishing the duty to deliver fugitives from the many other species of constitutional duty enforceable in the federal courts. Because the duty is directly imposed upon the States by the Constitution itself, there is no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment. Even assuming, as respondents contend, that there is an "executive common law" of extradition, developed under *Dennison*, which provides a superior alternative to the "ministerial duty" to extradite provided for by the Constitution, no weight can be accorded to it. Long continuation of decisional law or administrative practice incompatible with the Constitution's requirements cannot overcome this Court's responsibility to enforce those requirements. Pp. 226–229.

2. It need not be determined what applicability the Extradition Clause, which refers only to "States," may have to the Commonwealth of Puerto Rico, since the Extradition Act clearly applies. Puerto Rico may predicate its mandamus action on the Act, without regard to the Clause's direct applicability. Pp. 229–230.

787 F. 2d 423, reversed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined, in Parts I, II–A, II–C, and III of which POWELL and O'CONNOR, JJ., joined, and in which SCALIA, J., joined in part. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which POWELL, J., joined, *post*, p. 230. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 231.

Lino J. Saldana argued the cause for petitioner. With him on the brief were *Hector Rivera Cruz*, Secretary of Justice of Puerto Rico, *Rafael Ortiz Carrion*, Solicitor General, and *Susan Estrich* and *Kathleen M. Sullivan*.

Brent R. Appel argued the cause for respondents. With him on the brief were *Thomas J. Miller*, Attorney General of Iowa, *Roxann Ryan* and *Pamela Greenman Dahl*, Assistant Attorneys General, and *William L. Kutmus*.

JUSTICE MARSHALL delivered the opinion of the Court.

This case requires that we reconsider the holding of *Kentucky* v. *Dennison*, 24 How. 66 (1861), that federal courts have no power to order the Governor of a State to fulfill the State's obligation under the Extradition Clause of the Constitution, Art. IV, §2, to deliver up fugitives from justice.

I

On January 25, 1981, respondent Ronald Calder, then a civilian air traffic controller employed by the Federal Aviation Administration in San Juan, Puerto Rico, struck two people with his automobile. One of the victims, Antonio de Jesus Gonzalez, was injured; his wife, Army Villalba, was killed. Villalba was eight months pregnant; her unborn child did not survive. App. 3a. The incident occurred in the parking lot of a grocery store in Aguadilla, Puerto Rico, after what was apparently an altercation between Calder and De Jesus Gonzalez. According to two sworn statements taken by police, one from De Jesus Gonzalez and one from a witness to the incident, after striking the couple Calder backed his car two or three times over the prostrate body of Villalba. App. to Pet for Cert. A34–A41.

On the basis of these statements, Calder was arrested, charged with homicide, arraigned before a municipal judge, and released on $5,000 bail. On February 4, 1981, Calder was arraigned before a District Court of the Commonwealth of Puerto Rico, charged with first-degree murder and attempted murder. Calder failed to appear at a preliminary hearing on March 4, 1981, and bail was increased to $50,000. Despite representations by counsel that Calder would appear at a preliminary hearing on April 13, 1981, he did not do so. At that time Calder was declared a fugitive from justice, and bail was increased to $300,000. The Puerto Rican police, having reason to believe that Calder had left Puerto Rico and returned to his family's home in Iowa, notified local authorities in Iowa that Calder was a fugitive wanted in Puerto Rico on murder charges. On April 24, 1981, Calder surrendered to local authorities in Polk County, Iowa, posted the $20,000 bond set by an Iowa Magistrate, and was released. *Id.*, at A18–A19.

On May 15, 1981, the Governor of Puerto Rico submitted to the Governor of Iowa a request for Calder's extradition. The requesting papers included the arrest warrant, the fugitive resolution, the charging documents, and three sworn statements of witnesses, including one in which the affiant identified a photograph of Calder as depicting the driver of the car. Counsel for Calder requested that the Governor of Iowa hold an extradition hearing, which was conducted by the Governor's counsel on June 17, 1981. *Id.*, at A19. This hearing was only partially transcribed, but the record does show that one of Calder's counsel was permitted to testify to his belief that "a white American man . . . could not receive a fair trial in the Commonwealth of Puerto Rico," App. 32a, while Calder himself testified to his understanding that "on numerous occasions" witnesses in Puerto Rican courts had been "bought." *Id.*, at 47a.

After the extradition hearing in Iowa, discussions between and among Calder's counsel, the Governors of Iowa and Puerto Rico, and the prosecutorial authorities in Puerto Rico were held, apparently with a view to negotiating a reduction of the charges lodged against Calder. These discussions were unavailing, and on December 28, 1981, Iowa's Governor, Robert Ray, formally notified the Governor of Puerto Rico that in the absence of a "change to a more realistic charge," the request for extradition was denied. App. to Pet. for Cert. A44. A subsequent extradition request made to Governor Ray's successor in office, respondent Terry Branstad, was also denied. *Id.*, at A21.

On February 15, 1984, petitioner Commonwealth of Puerto Rico filed a complaint in the United States District Court for the Southern District of Iowa against respondents Governor

Branstad and the State of Iowa,[1] seeking a declaration that failure to deliver Calder upon presentation of proper extradition papers violated the Extradition Clause and the Extradition Act, 18 U. S. C. § 3182 (Act).[2] The complaint further requested the issuance of a writ of mandamus directing respondent Branstad to perform the "ministerial duty" of extradition. App. 7a–8a. Respondents stipulated before the District Court that the extradition papers fully complied with the requirements of the Act. App. to Pet. for Cert. A20. The District Court dismissed the complaint, agreeing with respondents that this Court's holding in *Kentucky* v. *Dennison*, 24 How. 66 (1861), absolutely barred any attempt to invoke federal judicial authority to compel compliance with the Clause or the Act. Civil No. 84–126–E (SD Iowa, May 22, 1985), App. to Pet. for Cert. A10. The Court of Appeals "[r]eluctantly" affirmed. 787 F. 2d 423, 424 (CA8 1986).

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[1] Petitioner had previously sought to file a bill of complaint in this Court, under our original jurisdiction. Motion for leave to file the bill was denied. *Puerto Rico* v. *Iowa*, 464 U. S. 1034 (1984).

[2] Section 3182 provides:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

The statute has remained substantially unchanged since its original enactment in the Extradition Act of 1793, 1 Stat. 302. See also 18 U. S. C. § 662 (1940 ed.); Rev. Stat. § 5278.

We granted certiorari, 479 U. S. 811 (1986), to consider whether the propositions concerning the limitation of federal judicial power stated in *Kentucky* v. *Dennison* in 1861 retain their validity today. We reverse.

II

A

Kentucky v. *Dennison* was an action brought under this Court's original jurisdiction to compel by writ of mandamus the extradition of a fugitive felon. The grand jury of Woodford County, Kentucky, returned an indictment in October 1859 charging Willis Lago, a "free man of color," with the crime of assisting the escape of a slave. 24 How., at 67. The defendant was a resident of Ohio, and papers requesting his extradition were served upon William Dennison, the Governor of that State. Dennison secured an opinion from Ohio's Attorney General, who took the view that the Extradition Clause[3] covered only those acts which were crimes under the law of the asylum State, or which were "regarded as *malum in se* by the general judgment and conscience of civilized nations." *Id.*, at 69.[4] On this basis Dennison refused extradition, and Kentucky brought its mandamus action in this Court.

The case was heard in February 1861, and decided on March 14. On that date secession was a fact, and civil war a threatening possibility. The Representatives of the States of the Deep South had withdrawn from the Congress. Justice Campbell was reputedly engaged in mediation efforts between the seceding States and the Lincoln administration, but his resignation from the Court and departure from Washington were imminent; he resigned on April 30, 1861. See 5 C. Swisher, History of the Supreme Court of the United States: The Taney Period 688–689 (1974). It was in these circumstances, with the practical power of the Federal Government at its lowest ebb since the adoption of the Constitution, that Chief Justice Taney delivered the opinion of the Court.

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[3] "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Art. IV, § 2, cl. 2.

[4] This interpretation of the Extradition Clause was frequently invoked in the antebellum period by Governors of free States requested to extradite those who had assisted the escape of slaves. It was initially stated by Governor Seward of New York in 1841. See 2 Works of William H. Seward 502–509 (G. Baker ed. 1853); see generally 5 C. Swisher, History of the Supreme Court of the United States: The Taney Period 677–685 (1974).

The Court firmly rejected the position taken by Dennison and the Governors of other free States that the Extradition Clause required only the delivery of fugitives charged with acts which would be criminal by the law of the asylum State. "Under such a vague and indefinite construction," the Court said, "the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion." 24 How., at 102. Interpreting for the first time the language of the Clause, the Court looked to the fundamental role of the right to request extradition in binding the individual States into a nation:

> "Looking, therefore, to the words of the Constitution--to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders . . . —the conclusion is irresistible, that this compact engrafted in the Constitution included, and was intended to include, every offence made punishable by the law of the State in which it was committed, and that it gives the right to the Executive authority of the State to demand the fugitive from the Executive authority of the State in which he is found; that the right given to 'demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled." *Id.*, at 103.

The Court then turned to the Extradition Act of 1793, 1 Stat. 302. In the procedures for the regulation of extradition established by that Act, the Court found the same absolute right to demand and correlative obligation to deliver. As to the Governor of the asylum State under the Act, the Court determined that "[t]he duty which he is to perform is . . . merely ministerial—that is, to cause the party to be arrested, and delivered to the agent or authority of the State where the crime was committed." 24 How., at 106. But the Court concluded that "the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty" created by the Constitution. *Id.*, at 107. Such a construction was necessary, in the Court's view, to avoid constitutional infirmity.

> "The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Ibid.*

B

Thus, for over 125 years, *Kentucky* v. *Dennison* has stood for two propositions: first, that the Extradition Clause creates a mandatory duty to deliver up fugitives upon proper demand; and second, that the federal courts have no authority under the Constitution to compel performance of this ministerial duty of delivery. As to the first of these conclusions, the passage of time has revealed no occasion for doubt. The language of the Clause is "clear and explicit." *Michigan* v.

Doran, 439 U. S. 282, 286 (1978). Its mandatory language furthers its intended purposes: "to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed," and "to preclude any state from becoming a sanctuary for fugitives from justice of another state." *Id.*, at 287; see *Biddinger* v. *Commissioner of Police*, 245 U. S. 128, 132–133 (1917); *Appleyard* v. *Massachusetts*, 203 U. S. 222, 227 (1906). The Framers of the Constitution perceived that the frustration of these objectives would create a serious impediment to national unity, and the Extradition Clause responds to that perception. "It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill-will." *Kentucky* v. *Dennison*, 24 How., at 102. We reaffirm the conclusion that the commands of the Extradition Clause are mandatory, and afford no discretion to the executive officers or courts of the asylum State. See *California* v. *Superior Court of California*, 482 U. S. 400, 405–406 (1987).

The second, and dispositive, holding of *Kentucky* v. *Dennison* rests upon a foundation with which time and the currents of constitutional change have dealt much less favorably. If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it," 24 How., at 107, basic constitutional principles now point as clearly the other way. Within 15 years of the decision in *Dennison* it was said that "when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance," and it was no objection that such an order might be sought in the federal courts against a state officer. *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541 (1876).

It has long been a settled principle that federal courts may enjoin unconstitutional action by state officials. See *Ex parte Young*, 209 U. S. 123, 155–156 (1908). It would be superfluous to restate all the occasions on which this Court has imposed upon state officials a duty to obey the requirements of the Constitution, or compelled the performance of such duties; it may suffice to refer to *Brown* v. *Board of Education*, 349 U. S. 294 (1955), and *Cooper* v. *Aaron*, 358 U. S. 1 (1958). The fundamental premise of the holding in *Dennison*—"that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today." *FERC* v. *Mississippi*, 456 U. S. 742, 761 (1982).

Yet, with respect to extradition, the law has remained as it was more than a century ago. Considered *de novo*, there is no justification for distinguishing the duty to deliver fugitives from the many other species of constitutional duty enforceable in the federal courts. Indeed the nature of the obligation here is such as to avoid many of the problems with which federal courts must cope in other circumstances. That this is a ministerial duty precludes conflict with essentially discretionary elements of state governance, and eliminates the need for continuing federal supervision of state functions. The explicit and long-settled nature of the command, contained in a constitutional provision and a statute substantially unchanged for 200 years, eliminates the possibility that state officers will be subjected to inconsistent direction. Because the duty is directly imposed upon the States by the Constitution itself, there can be no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment.

Respondents contend, however, that an "executive common law" of extradition has developed through the efforts of Governors to employ the discretion accorded them under *Dennison*, and that this "common law" provides a superior alternative to the "ministerial duty" to extradite provided for by the Constitution. Tr. of Oral Arg. 21. Even assuming the existence of this tradition of "executive common law," no weight can be accorded to it. Long continuation of decisional law or administrative practice incompatible with the requirements of the Constitution cannot overcome our responsibility to enforce those requirements. See, *e. g.*, *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Green* v. *New Kent County School Board*, 391 U. S. 430 (1968). Though not articulated in these terms, respondents' argument is in essence a request that we reconsider our construction of the Extradition Clause to establish as a matter of constitutional interpretation a discretion which has hitherto been exercised solely because the Constitution's explicit command has gone unenforced. This, for the reasons previously stated, we decline to do.

C

Respondents further contend that even if the holding in *Kentucky* v. *Dennison* cannot withstand contemporary scrutiny, petitioner would not profit from its demise because Puerto Rico is not a State, and has no right to demand rendition of fugitives under the Extradition Clause. It is true that the words of the Clause apply only to "States," and we have never held that the Commonwealth of Puerto Rico is entitled to all the benefits conferred upon the States under the Constitution. We need not decide today what applicability the Extradition Clause may have to the Commonwealth of Puerto Rico, however, for the Extradition Act clearly applies. The Act requires rendition of fugitives at the request of a demanding "Territory," as well as State. It was decided long ago that Puerto Rico, as a Territory of the United States, could invoke the Act to reclaim fugitives from its justice, see *New York ex rel. Kopel* v. *Bingham*, 211 U. S. 468 (1909), and respondents do not challenge the correctness of that holding. The subsequent change to Commonwealth status through legislation, see 64 Stat. 319, 48 U. S. C. §§ 731b–731d, did not remove from the Government of the Commonwealth any power to demand extradition which it had possessed as a Territory, for the intention of that legislation was "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U. S. 572, 594 (1976). Since the Act applies to Puerto Rico, the Commonwealth may invoke the power of federal courts to enforce against state officers rights created by federal statutes, including equitable relief to compel performance of federal statutory duties. See *Maine* v. *Thiboutot*, 448 U. S. 1 (1980). Accordingly, Puerto Rico may predicate its mandamus action on the Act, without regard to the direct applicability of the Extradition Clause.[5]

III

Kentucky v. *Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development. Yet this decision has stood while the world of which it was a part has passed away. We conclude that it may stand no longer. The decision of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR, with whom JUSTICE POWELL joins, concurring in part and concurring in the judgment.

I join Parts I, II–A, II–C, and III of the Court's opinion. Because the Court ultimately resolves this case under the

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[5] Respondents contend: "Puerto Rico seeks to force the states to honor its rendition requests even though Congressional representatives of the states have not had an opportunity to consider the admission of Puerto Rico as a state into the Union . . . . Puerto Rico's argument . . . serves to eviscerate the significance of the statehood admissions process." Brief for Respondents 22. Leaving aside the fact that Congress enacted the legislation which made Puerto Rico first a Territory and then a Commonwealth, this curious logic would suggest that Iowa is not required to extradite felons to States, such as New York and Massachusetts, whose presence in the Union is not attributable to votes cast in Congress.

Extradition Act, 18 U. S. C. § 3182, I do not find Part II–B, and its statements concerning the Extradition Clause of the Constitution, necessary to the decision of this case. Accordingly, I do not subscribe to that part of the Court's opinion. See, *e. g.*, *Jean* v. *Nelson*, 472 U. S. 846, 854 (1985); *Kolender* v. *Lawson*, 461 U. S. 352, 361, n. 10 (1983); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring).

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I concur in the result, and in the portions of the Court's opinion applying 18 U. S. C. § 3182 and overruling *Kentucky* v. *Dennison*, 24 How. 66 (1861), insofar as it interpreted the predecessor of that statute. I note that no party before us has asserted the lack of power of Congress to require extradition from a State to a Territory.

TYLER PIPE INDUSTRIES, INC. *v.* WASHINGTON STATE DEPARTMENT OF REVENUE

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 85-1963. Argued March 2, 1987—Decided June 23, 1987*

Washington imposes a business and occupation (B & O) tax on the privilege of engaging in business activities in the State, including manufacturing in the State and making wholesale sales in the State. The measure of the wholesale tax is the gross proceeds of sales, and the measure of the manufacturing tax is the value of the manufactured product. However, under the B & O tax's "multiple activities exemption," local manufacturers are exempted from the manufacturing tax for the portion of their output that is subject to the wholesale tax. Application of the exemption results in local manufacturers' paying the wholesale tax on local sales, local manufacturers' paying only the manufacturing tax on their out-of-state sales, and out-of-state manufacturers' paying the wholesale tax on their sales in Washington. The same tax rate is applicable to both wholesaling and manufacturing activities. In both of the cases under review, which originated as state-court tax refund suits by appellants, local manufacturers who sold their goods outside Washington and out-of-state manufacturers who sold their goods in Washington, the trial court held that the multiple activities exemption did not discriminate against interstate commerce in violation of the Commerce Clause. In No. 85-1963, appellant Tyler Pipe Industries, Inc. (Tyler)—an out-of-state manufacturer who sold its products in Washington but had no property or employees in Washington, and whose solicitation of business in Washington was conducted by an independent contractor located in Washington—also asserted that its business did not have a sufficient nexus with Washington to justify the collection of the tax on its wholesale sales there. The trial court upheld the B & O tax. The Washington Supreme Court affirmed in both cases.

Held:

1. Washington's manufacturing tax discriminates against interstate commerce in violation of the Commerce Clause because, through the operation of the multiple activities exemption, the tax is assessed only on those products manufactured in Washington that are sold to out-of-state customers. The exemption for local manufacturers that sell their prod-

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*Together with No. 85-2006, *National Can Corp. et al.* v. *Washington State Department of Revenue*, also on appeal from the same court.

ucts within the State has the same facially discriminatory consequences as the West Virginia tax exemption that was invalidated in *Armco Inc.* v. *Hardesty*, 467 U. S. 638, and the reasons for invalidating the tax in that case also apply to the Washington tax. The facial unconstitutionality of Washington's tax cannot be alleviated by examining the effect of other States' tax legislation to determine whether specific interstate transactions are subject to multiple taxation. Nor can Washington's imposition of the manufacturing tax on local goods sold outside the State be saved as a valid "compensating tax." Manufacturing and wholesaling are not "substantially equivalent events," *id.*, at 643, such that taxing the manufacture of goods sold outside the State can be said to compensate for the State's inability to impose a wholesale tax on such goods. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, distinguished. To the extent that the ruling here is inconsistent with the ruling in *General Motors Corp.* v. *Washington*, 377 U. S. 436—where the B & O tax was upheld as against claims that it unconstitutionally taxed unapportioned gross receipts and did not bear a reasonable relation to the taxpayer's in-state activities—that case is overruled. Pp. 239–248.

2. The activities of Tyler's sales representative in Washington adequately support the State's jurisdiction to tax Tyler's wholesale sales to in-state customers. The showing of a sufficient nexus cannot be defeated by the argument that the taxpayer's representative was properly characterized as an independent contractor rather than an agent. Cf. *Scripto, Inc.* v. *Carson*, 362 U. S. 207. Nor is there any merit to Tyler's contention that the B & O tax does not fairly apportion the tax burden between its activities in Washington and its activities in other States. Such contention rests on the erroneous assumption that, through the B & O tax, Washington is taxing the unitary activity of manufacturing and wholesaling. The manufacturing tax and the wholesaling tax are not compensating taxes for substantially equivalent events, and, thus, the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. Pp. 248–251.

3. Appellee's argument against retroactive application of any adverse decision here should be considered, in the first instance, by the Washington Supreme Court on remand. Cf. *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263. Pp. 251–253.

105 Wash. 2d 318, 715 P. 2d 123, and 105 Wash. 2d 327, 715 P. 2d 128, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, and in Part

IV of which SCALIA, J., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 253. SCALIA, J., filed an opinion concurring in part and dissenting in part, in Part I of which REHNQUIST, C. J., joined, *post*, p. 254. POWELL, J., took no part in the consideration or decision of the cases.

Neil J. O'Brien argued the cause for appellant in No. 85-1963. With him on the briefs was *Peter J. Turner*. *D. Michael Young* argued the cause for appellants in No. 85-2006. With him on the briefs were *John T. Piper* and *Franklin G. Dinces*.

William Berggren Collins, Assistant Attorney General of Washington, argued the cause for appellee in both cases. With him on the brief were *Kenneth O. Eikenberry*, Attorney General, and *James R. Tuttle*, *Leland T. Johnson*, and *Timothy R. Malone*, Assistant Attorneys General.†

JUSTICE STEVENS delivered the opinion of the Court.

In *Armco Inc.* v. *Hardesty*, 467 U. S. 638 (1984), we held that West Virginia's gross receipts tax on the business of selling tangible property at wholesale discriminated against interstate commerce because it exempted local manufacturers. The principal question in these consolidated appeals is whether Washington's manufacturing tax similarly violates the Commerce Clause of the Constitution because it is assessed only on those products manufactured within Washington that are sold to out-of-state purchasers. We conclude that our reasons for invalidating the West Virginia tax in *Armco* also apply to the Washington tax challenged here.

I

For over half a century Washington has imposed a business and occupation (B & O) tax on "the act or privilege of engaging in business activities" in the State. Wash. Rev. Code § 82.04.220 (1985). The tax applies to the activities of extracting raw materials in the State,[1] manufacturing in the State,[2] making wholesale sales in the State,[3] and making retail sales in the State.[4] The State has typically applied the same tax rates to these different activities. The measure of the selling tax is the "gross proceeds of sales," and the measure of the manufacturing tax is the value of the manufactured products. §§ 82.04.220, 82.04.240.

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†*E. Barrett Prettyman, Jr.*, and *John G. Roberts, Jr.*, filed a brief for Amcord, Inc., et al. as *amici curiae* urging reversal in No. 85-2006. *Jean A. Walker* filed a brief for the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* urging reversal in both cases.

Benna Ruth Solomon and *Mark C. Rutzick* filed a brief for the National Governors' Association et al. as *amici curiae* urging affirmance.

Prior to 1950, the B & O tax contained a provision that exempted persons who were subject to either the extraction tax or the manufacturing tax from any liability for either the wholesale tax or the retail tax on products extracted or manufactured in the State.[5] Thus, the wholesale tax applied to out-of-state manufacturers but not to local manufacturers. In 1948 the Washington Supreme Court held that this wholesale tax exemption for local manufacturers discriminated against interstate commerce and therefore violated the Commerce Clause of the Federal Constitution. *Columbia Steel Co.* v. *State*, 30 Wash. 2d 658, 192 P. 2d 976 (1948). The State Supreme Court rejected the State's argument that the taxpayer had not suffered from discrimination against interstate commerce because it had not proved that it paid manufacturing tax to another State.[6] The Washington Supreme Court also dismissed the State's contention that if the State in which a good was manufactured did not impose a manufacturing tax, the seller of the good would have a competitive advantage over Washington manufacturers:

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[1] Wash. Rev. Code § 82.04.230 (1985).

[2] § 82.04.240.

[3] § 82.04.270.

[4] § 82.04.250.

[5] The statute provided:

"'Every person engaging in activities which are within the purview of the provisions of two or more paragraphs (a), (b), (c), (d), (e), (f) and (g) of section 4 [§ 8370–4], shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however, That persons taxable under paragraphs (a) or (b) of said section shall not be taxable under paragraphs (c) or (e) of said section with respect to making sales at retail or wholesale of products extracted or manufactured within this state by such persons*' (Italics ours)." See *Columbia Steel Co.* v. *State*, 30 Wash. 2d 658, 661, 192 P. 2d 976, 977–978 (1948).

> "[T]he situation obtaining in another state is immaterial. We must interpret the statute as passed by the legislature. In our opinion the statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in § 8370–6, not levied upon those who perform the same taxable act, but who manufacture in the state of Washington." *Id.*, at 664, 192 P. 2d, at 979.

Two years later, in 1950, the Washington Legislature responded to this ruling by turning the B & O tax exemption scheme inside out. The legislature removed the wholesale tax exemption for local manufacturers and replaced it with an exemption from the manufacturing tax for the portion of manufacturers' output that is subject to the wholesale tax.[7] The result, as before 1950, is that local manufacturers pay the manufacturing tax on their interstate sales and out-of-state manufacturers pay the wholesale tax on their sales in Washington. Local manufacturer-wholesalers continue to

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[6] "'The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce.'" *Id.*, at 663, 192 P. 2d, at 978 (quoting *Freeman* v. *Hewit*, 329 U. S. 249, 256 (1946)).

[7] The Washington Supreme Court upheld this revised scheme against constitutional challenge in *B. F. Goodrich Co.* v. *State*, 38 Wash. 2d 663, 231 P. 2d 325, cert. denied, 342 U. S. 876 (1951).

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pay only one gross receipts tax, but it is now applied to the activity of wholesaling rather than the activity of manufacturing. Although the tax rate has changed over the years—it is now forty-four hundredths of one percent, or 0.44%, of gross receipts—the relevant provisions of Washington's B & O tax are the same today as enacted in 1950.[8]

The constitutionality of the B & O tax has been challenged on several occasions,[9] most strenuously in *General Motors Corp.* v. *Washington*, 377 U. S. 436 (1964). In that case a bare majority of the Court upheld the tax; JUSTICE BRENNAN and Justice Goldberg filed dissenting opinions. The bulk of the Court's opinion was devoted to rejecting the claims that the statute unconstitutionally taxed unapportioned gross receipts and did not bear a reasonable relation to the taxpayer's in-state activities. At the end of its opinion, the Court declined to reach the argument that the tax imposed multiple tax burdens on interstate transactions, because the taxpayer had failed to demonstrate "what definite burden, in a constitutional sense" other States' laws had placed on "the identical interstate shipments by which Washington measures its tax." *Id.*, at 449. Justice Goldberg, joined by Justice Stewart and JUSTICE WHITE, dissented because "[t]he burden on interstate commerce and the dangers of multiple taxation" were apparent from the face of the statute. *Id.*, at 459.[10] Comparing the current statute with its invalid predecessor, this dissent concluded that the "amended provision would seem to have essentially the same economic effect on interstate sales but has the advantage of appearing nondiscriminatory." *Id.*, at 460. Today we squarely address the claim that this provision discriminates against interstate commerce.

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[8] The multiple activities exemption provides:

"(1) [E]very person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

"(2) Persons taxable under RCW 82.04.250 [tax on retailers] or 82.04.270 [tax on wholesalers and distributors] shall not be taxable under RCW 82.04.230 [tax on extractors], 82.04.240 [tax on manufacturers] or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 [tax on certain food processing activities] with respect to extracting or manufacturing of the products so sold.

"(3) Persons taxable under RCW 82.04.240 or RCW 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured." Wash. Rev. Code § 82.04.440 (1985).

[9] See, *e. g.*, *B. F. Goodrich Co.* v. *State*, *supra*; *General Motors Corp.* v. *Washington*, 377 U. S. 436 (1964); *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, 419 U. S. 560 (1975); *Chicago Bridge & Iron Co.* v. *Washington Dept. of Revenue*, 98 Wash. 2d 814, 659 P. 2d 463, appeal dism'd, 464 U. S. 1013 (1983).

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[10] Justice Goldberg explained the functional equivalency for Commerce Clause purposes of the invalidated pre-1950 statute and its successor:

"The burden on interstate commerce and the dangers of multiple taxation are made apparent by considering Washington's tax provisions. The Washington provision here involved—the 'tax on wholesalers'—provides that every person 'engaging within this state in the business of making sales at wholesale' shall pay a tax on such business 'equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent.' Rev. Code Wash. 82.04.270; Wash. Laws 1949, c. 228, § 1 (e). In the same chapter Washington imposes a 'tax on manufacturers' which similarly provides that every person 'engaging within this state in business as a manufacturer' shall pay a tax on such business 'equal to the value of the products . . . manufactured, multiplied by the rate of one-quarter of one per cent.' Rev. Code Wash. 82.04.240; Wash. Laws 1949, c. 228, § 1 (b). Then in a provision entitled 'Persons taxable on multiple activities' the statute endeavors to insure that local Washington products will not be subjected both to the 'tax on manufacturers' and to the 'tax on wholesalers.' Rev. Code Wash. 82.04.440; Wash. Laws 1949, c. 228, § 2-A. Prior to its amendment in 1950 the exemptive terms of this 'multiple activities' provision were designed so that a Washington manufacturer-wholesaler would pay the manufacturing tax and be exempt from the wholesale tax. This provision, on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers. In 1950, however, the 'multiple activities' provision was amended, reversing the tax and the exemption, so that a Washington manufacturer-wholesaler would first be subjected to the wholesale tax and then, to the extent that he is taxed thereunder, exempted from the manufacturing tax. Rev. Code Wash. 82.04.440; Wash. Laws 1950 (special session), c. 5, § 2. See *McDonnell & McDonnell* v. *State*, 62 Wash. 2d 553, 557, 383 P. 2d 905, 908. This amended provision would seem to have essentially the same economic effect on interstate sales but has the advantage of appearing nondiscriminatory." *General Motors Corp.* v. *Washington*, 377 U. S., at 459–460 (dissenting opinion).

II

Two appeals are before us. In the first case (No. 85-2006), 71 commercial enterprises filed 53 separate actions for refunds of B & O taxes paid to the State. The Thurston County Superior Court joined the actions, found that the multiple activities exemption did not violate the Commerce Clause, and granted the State Department of Revenue's motion for summary judgment. In the second case (No. 85-1963), Tyler Pipe Industries, Inc. (Tyler), sought a refund of B & O taxes paid during the years 1976 through 1980 for its wholesaling activities in Washington. Again, the Superior Court upheld the B & O tax. The Washington Supreme Court affirmed in both cases. 105 Wash. 2d 327, 732 P. 2d 134 (1986); 105 Wash. 2d 318, 715 P. 2d 123 (1986).

The State Supreme Court concluded that the B & O tax was not facially discriminatory and rejected the appellants' arguments that our decision invalidating West Virginia's exemption for local wholesaler-manufacturers, *Armco Inc.* v. *Hardesty*, 467 U. S. 638 (1984), required that the B & O tax be invalidated. The state court expressed the view that the West Virginia wholesale tax imposed on out-of-state manufacturers in *Armco* could not be justified as a compensating tax because of the substantial difference between the State's tax rates on manufacturing activities (.0088) and wholesaling activities (.0027), and because West Virginia did not provide for a reduction in its manufacturing tax when the manufactured goods were sold out of State, but did reduce the tax when the goods were partly manufactured out of State. The Washington Supreme Court then concluded that our requirement that a tax must have "'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade," *Armco*, 467 U. S., at 644, was not dispositive because it merely relieved the taxpayer of the burden of proving that a tax already demonstrated to be facially discriminatory had in fact resulted in multiple taxation. The Washington Supreme Court also rejected the taxpayers' arguments that the B & O tax is not fairly apportioned to reflect the amount of business conducted in the State and is not fairly related to the services rendered by Washington.

We noted probable jurisdiction of the taxpayers' appeals, 479 U. S. 810 (1986), and now reverse in part and affirm in part. We first consider the claims of the taxpayers that have manufacturing facilities in Washington and market their products in other States; their challenge is directed to the fact that the manufacturing tax is levied only on those goods manufactured in Washington that are sold outside the State. We then consider Tyler's claims that its activities in the State of Washington are not sufficient to subject it to the State's taxing jurisdiction and that the B & O tax is not fairly apportioned.

III

A person subject to Washington's wholesale tax for an item is not subject to the State's manufacturing tax for the same item. This statutory exemption for manufacturers that sell their products within the State has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*. West Virginia imposed a gross receipts tax at the rate of 0.27% on persons engaged in the business of selling tangible property at wholesale. Local manufacturers were exempt from the tax, but paid a manufacturing tax of 0.88% on the value of products manufactured in the State. Even though local manufacturers bore a higher tax burden in dollars and cents, we held that their exemption from the wholesale tax violated the principle that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U. S., at 642.

In explaining why the tax was discriminatory on its face, we expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in *General Motors Corp.* v. *Washington*, 377 U. S., at 459. We explained:

> "The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price. See *General Motors Corp.* v. *Washington*, 377 U. S. 436, 459 (1964) (Goldberg, J., dissenting) (similar provision in Washington, 'on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers'); *Columbia Steel Co.* v. *State*, 30 Wash. 2d 658, 664, 192 P. 2d 976, 979 (1948) (invalidating Washington tax)." 467 U. S., at 642.

Our square reliance in *Armco* on Justice Goldberg's earlier dissenting opinion is especially significant because that dissent dooms appellee's efforts to limit the reasoning of *Armco* to the precise statutory structure at issue in that case. Justice Goldberg expressly rejected the distinction appellee attempts to draw between an exemption from a wholesaling tax—as was present in *Armco*—and the exemption from a manufacturing tax which was present in *General Motors* and is again present in these cases. See 377 U. S., at 459–460. Our holding in *Armco* requires that we now agree with Justice Goldberg's conclusion that the exemption before us is the practical equivalent of the exemption that the Washington Supreme Court invalidated in 1948.

General Motors is not a controlling precedent. As we have already noted, the result in that case did not depend on the Court's resolution of whether the tax burdened interstate commerce. Our reason for not passing on that question was that the taxpayer had "not demonstrated what definite burden, in a constitutional sense [the tax imposed by other States] places on the identical shipments by which Washington measures its tax." 377 U. S., at 449. Thus, when *General Motors* was decided, the Court required the taxpayer to prove that specific interstate transactions were subjected to multiple taxation in order to advance a claim of discrimination. See also *Standard Pressed Steel Co.* v. *Washington Revenue Dept.*, 419 U. S. 560, 563 (1975) (rejecting Commerce Clause claim because taxpayer made no showing of risk of multiple taxation). In *Armco*, however, we categorically rejected this requirement. The facial unconstitutionality of Washington's gross receipts tax cannot be alleviated by examining the effect of legislation enacted by its sister States. See *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 276–278 (1978).[11]

We also reject the Department's contention that the State's imposition of the manufacturing tax on local goods sold outside the State should be saved as a valid "compensating tax." As we noted in *Maryland* v. *Louisiana*, 451 U. S. 725, 758 (1981), the "concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." In these cases the only burden for which the manufacturing tax exemption is arguably compensatory is the State's imposition of a wholesale tax on the local sales of local manufacturers; absent the exemption, a local manufacturer might be at an economic disadvantage because it would pay both a manufacturing and a wholesale tax, while the manufacturer from afar would pay only the wholesale tax. The State's justification for thus taxing the manufacture of goods in interstate commerce, however, fails under our precedents. The local sales of out-of-state manufacturers are also subject to Washington's wholesale tax, but the multiple activities exemption does not extend its ostensible compensatory benefit to those manufacturers. The exemption thus does not merely erase a tax incentive to engage in interstate commerce instead of intrastate commerce; it affirmatively places interstate commerce at a disadvantage.

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[11] In *Armco Inc.* v. *Hardesty*, 467 U. S. 638 (1984), we quoted with approval the following sentence from the Court's opinion in *Freeman* v. *Hewit*, 329 U. S., 249, 256 (1946):

"The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment." See 467 U. S., at 645, n. 8.

The Washington Supreme Court also relied on *Freeman* v. *Hewit* in *Columbia Steel Co.* v. *State*, 30 Wash. 2d, at 663, 192 P. 2d, at 978.

"[T]he common theme running through the cases in which this Court has sustained compensating" taxes is "[e]qual treatment of interstate commerce." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 331 (1977). See also *Maryland* v. *Louisiana*, 451 U. S., at 759. In *Boston Stock Exchange*, a New York transfer tax on securities transactions taxed transactions involving an out-of-state sale more heavily than other transactions involving an in-state sale. We invalidated the tax, rejecting the State's claim that it was compensatory legislation designed to neutralize the competitive advantage enjoyed by stock exchanges outside New York. We concluded:

> "Because of the delivery or transfer in New York, the seller cannot escape tax liability by selling out of State, but he can substantially reduce his liability by selling in State. The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges. Rather than 'compensating' New York for a supposed competitive disadvantage resulting from § 270, the amendment forecloses tax-neutral decisions and creates both an ad-

> vantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." 429 U. S., at 331.

Similarly, in *Maryland* v. *Louisiana*, we held that a tax on the first use in Louisiana of gas brought into the State was not a "complement of a severance tax in the same amount imposed on gas produced within the State." *Armco*, 467 U. S., at 642–643, citing *Maryland* v. *Louisiana*, 451 U. S., at 758–759. We relied on the observation that severance and first use were not "substantially equivalent" events on which mutually compensating taxes might be imposed. And in *Armco* we squarely held that manufacturing and wholesaling are not substantially equivalent activities. As we wrote in that case:

> "The gross sales tax imposed on Armco cannot be deemed a 'compensating tax' for the manufacturing tax imposed on its West Virginia competitors. . . . Here, too, manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State. Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales." 467 U. S., at 642–643.

See also *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 272 (1984). In light of the facially discriminatory nature of the multiple activities exemption, we conclude, as we did in *Armco*, that manufacturing and wholesaling are not "substantially equivalent events" such that taxing the manufacture of goods sold outside the State can be said to compensate for the State's inability to impose a wholesale tax on those goods.[12]

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[12] Nor may the tax be justified as an attempt to compensate the State for its inability to impose a similar burden on out-of-state manufacturers

Appellee also contends that its B & O tax is valid because of its asserted similarities to a tax and exemption system we have upheld. The State assessed a use tax on personal property used within the State but originally purchased elsewhere to compensate for the burden that a sales tax placed on similar property purchased within the State. See *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937). Appellee's reliance on *Henneford* v. *Silas Mason Co.*, however, does not aid its cause. That case addressed a use tax imposed by the State of Washington on the "privilege of using within this state any article of tangible personal property." The tax did not apply to "the use of any article of tangible personal property" the sale or use of which had already been taxed at an equal or greater rate under the laws of Washington or some other State. *Id.*, at 580–581. We upheld the tax because, in the context of the overall tax structure, the burden it placed on goods purchased out-of-state was identical to that placed on an equivalent purchase within the State. This identical impact was no fortuity; it was guaranteed by the statutory exemption from the use tax for goods on which a sales tax had already been paid,[13] regardless of whether the sales tax had been paid to Washington or to another State.[14]

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whose goods are sold in Washington, for Washington subjects those sales to wholesale tax.

[13] Many States provide tax credits that alleviate or eliminate the potential multiple taxation that results when two or more sovereigns have jurisdiction to tax parts of the same chain of commercial events. For example, the District of Columbia and all but three States with sales and use taxes provide a credit against their own use taxes for sales taxes paid to another State, although reciprocity may be required. See CCH State Tax Guide 6013–6014 (1986); *Williams* v. *Vermont*, 472 U. S. 14, 22 (1985). See also *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 74–75 (1963).

[14] In his opinion for the Court in *Henneford* v. *Silas Mason Co.*, Justice Cardozo carefully described the relationship between the 2% "tax on retail sales" imposed by Title III of Washington's 1935 tax code and the "compensating tax" imposed by Title IV on the privilege of use. The compensating use tax was imposed on the use of an article of tangible personal property which had been purchased at retail but had not been subjected to

As we explained in *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 70 (1963):

> "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state."

The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington. The multiple activities exemption only operates to impose a unified tax eliminating the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried out within the State. The exemption excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity out-

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a sales tax that was equal to or in excess of that imposed by the State of Washington. If the rate of the tax imposed by another jurisdiction was less than 2%, the rate of the compensating tax was measured by the difference. Explaining why such a compensating tax does not discriminate against interstate commerce, Justice Cardozo wrote:

"Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. *It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there.* No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." 300 U. S., at 583–584 (emphasis added).

side the State. Washington's B & O tax scheme is therefore inconsistent with our precedents holding that a tax violates the Commerce Clause "when it unfairly burdens commerce by exacting more than a just share from the interstate activity." *Washington Dept. of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734, 748 (1978).

As we explained in *Armco*, our conclusion that a tax facially discriminates against interstate commerce need not be confirmed by an examination of the tax burdens imposed by other States:

> "Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. This is not the test. In *Container Corp. of America* v. *Franchise Tax Board*, 463 U. S. 159, 169 (1983), the Court noted that a tax must have 'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade. In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce. See also *id.*, at 170–171. Any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated." 467 U. S., at 644–645 (footnote omitted).[15]

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[15] Even the solitary dissenting opinion in the *Armco* case did not question the proposition that the constitutionality of the West Virginia tax

We conclude that Washington's multiple activities exemption discriminates against interstate commerce as did the tax struck down by the Washington Supreme Court in 1948 and the West Virginia tax that we invalidated in *Armco*. The current B & O tax exposes manufacturing or selling activity outside the State to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt. The fact that the B & O tax "has the advantage of appearing nondiscriminatory," see *General Motors Corp.*, 377 U. S., at 460 (Goldberg, J., dissenting), does not save it from invalidation. To the extent that this conclusion is inconsistent with the Court's ruling in the *General Motors* case, that case is overruled.[16]

IV

Our holding that Washington's tax exemption for a local manufacturer-wholesaler violates the Commerce Clause disposes of the issues raised by those appellants in *National Can* that manufacture goods in Washington and sell them outside the State, as well as the claim of discrimination asserted by those appellants that manufacture goods outside Washington and sell them within the State. Compliance

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could properly be discerned merely by referring to the text of the tax statute itself:

"It is plain that West Virginia's tax would be unconstitutionally discriminatory if it levied no tax on manufacturing or taxed manufacturing at a lower rate than wholesaling, for then the out-of-state wholesaler would be paying a higher tax than the in-state manufacturer-wholesaler." 467 U. S., at 646 (REHNQUIST, J., dissenting).

Instead, the dissent argued that West Virginia's taxing scheme, taken in its entirety, did not discriminate against out-of-state manufacturers because the manufacturing tax paid by a local manufacturer-wholesaler was much higher than the wholesale tax exacted from an out-of-state manufacturer.

[16] In view of our holding on the discrimination issue, we need not reach the claim of local state manufacturers selling to interstate markets that the tax scheme does not fairly apportion tax liabilities between Washington and other States.

with our holding on the discrimination issue, however, would not necessarily preclude the continued assessment of a wholesaling tax. Either a repeal of the manufacturing tax or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination. We must therefore also consider the alternative challenge to the wholesale tax advanced by Tyler and the other appellants that manufacture products outside of Washington for sale in the State.

Tyler seeks a refund of wholesale taxes it paid on sales to customers in Washington for the period from January 1, 1976, through September 30, 1980. These products were manufactured outside of Washington. Tyler argues that its business does not have a sufficient nexus with the State of Washington to justify the collection of a gross receipts tax on its sales. Tyler sells a large volume of cast iron, pressure and plastic pipe and fittings, and drainage products in Washington, but all of those products are manufactured in other States. Tyler maintains no office, owns no property, and has no employees residing in the State of Washington. Its solicitation of business in Washington is directed by executives who maintain their offices out-of-state and by an independent contractor located in Seattle.

The trial court found that the in-state sales representative engaged in substantial activities that helped Tyler to establish and maintain its market in Washington. The State Supreme Court concluded that those findings were supported by the evidence, and summarized them as follows:

> "The sales representatives acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders. They have long-established and valuable relationships with Tyler Pipe's customers. Through sales contacts, the representatives maintain and improve the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe.

> "Tyler Pipe sells in a very competitive market in Washington. The sales representatives provide Tyler Pipe with virtually all their information regarding the Washington market, including: product performance; competing products; pricing, market conditions and trends; existing and upcoming construction products; customer financial liability; and other critical information of a local nature concerning Tyler Pipe's Washington market. The sales representatives in Washington have helped Tyler Pipe and have a special relationship to that corporation. The activities of Tyler Pipe's agents in Washington have been substantial." 105 Wash. 2d, at 325, 715 P. 2d, at 127.

As a matter of law, the Washington Supreme Court concluded that this showing of a sufficient nexus could not be defeated by the argument that the taxpayer's representative was properly characterized as an independent contractor instead of as an agent. We agree with this analysis. In *Scripto, Inc.* v. *Carson*, 362 U. S. 207 (1960), Scripto, a Georgia corporation, had no office or regular employees in Florida, but it employed wholesalers or jobbers to solicit sales of its products in Florida. We held that Florida may require these solicitors to collect a use tax from Florida customers. Although the "salesmen" were not employees of Scripto, we determined that "such a fine distinction is without constitutional significance." *Id.*, at 211. This conclusion is consistent with our more recent cases. See *National Geographic Society* v. *California Equalization Board*, 430 U. S. 551, 556–558 (1977).

As the Washington Supreme Court determined, "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." 105 Wash. 2d, at 323, 715 P. 2d, at 126. The court found this standard was satisfied because Tyler's "sales representatives perform any local activities necessary for maintenance of Tyler Pipe's market and protection of its interests . . . ." *Id.*, at 321, 715 P. 2d, at 125. We agree that the activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax on Tyler.

Tyler also asserts that the B & O tax does not fairly apportion the tax burden between its activities in Washington and its activities in other States. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 285 (1977). Washington taxes the full value of receipts from in-state wholesaling or manufacturing; thus, an out-of-state manufacturer selling in Washington is subject to an unapportioned wholesale tax even though the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State that plainly has jurisdiction to tax that activity. This apportionment argument rests on the erroneous assumption that through the B & O tax, Washington is taxing the unitary activity of manufacturing and wholesaling. We have already determined, however, that the manufacturing tax and wholesaling tax are not compensating taxes for substantially equivalent events in invalidating the multiple activities exemption. Thus, the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. See *Moorman Mfg. Co.* v. *Bair*, 437 U. S., at 280–281 (gross receipts tax on sales to customers within State would be "plainly valid"); *Standard Pressed Steel Co.* v. *Washington Revenue Dept.*, 419 U. S., at 564 (selling tax measured by gross proceeds of sales is "apportioned exactly to the activities taxed").

V

The Department of Revenue argues that any adverse decision in these cases should not be applied retroactively because the taxes at issue were assessed prior to our opinion in

Armco and the holding in that case was not clearly foreshadowed by earlier opinions. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971) (factors to consider in deciding whether to impose decision prospectively only). The State's argument is similar to an argument advanced by the State of Hawaii in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S., at 276–277. The State urged that, if we invalidated the tax at issue, we should not require the payment of refunds to taxpayers. We did not resolve the merits of that issue, concluding that this Court should not take it upon itself in this complex area of state tax structures to determine how to apply its holding:

> "These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law. Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case. We are reluctant, therefore, to address them in the first instance. Accordingly, we reverse the judgment of the Supreme Court of Hawaii and remand for further proceedings not inconsistent with this opinion." *Id.*, at 277 (footnote omitted).

We followed this approach in *Williams* v. *Vermont*, 472 U. S. 14 (1985), an opinion which invalidated the State's residency restriction on the availability of a sales tax credit for use tax paid to another State. We expressed no opinion on the appropriate remedy, instead remanding to the Supreme Court of Vermont "in light of the fact that the action was dismissed on the pleadings, and given the possible relevance of state law, see *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 277 (1984) . . . ." *Id.*, at 28. Cf. *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 622–623 (1985). We conclude that it is likewise appropriate for the Supreme Court of Washington to address in the first instance the refund issues raised by our rulings in these cases.

VI

We hold Washington's multiple activities exemption invalid because it places a tax burden upon manufacturers in Washington engaged in interstate commerce from which local manufacturers selling locally are exempt. We reject appellant Tyler's nexus and fair apportionment challenges to the State's wholesale tax. Our partial invalidation of the State's taxing scheme raises remedial issues that are better addressed by the State Supreme Court on remand. Accordingly, we vacate the judgments of the Supreme Court of Washington and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of these cases.

JUSTICE O'CONNOR, concurring.

I join the Court's opinion holding that "[i]n light of the facially discriminatory nature of the multiple activities exemption," *ante*, at 244, see *Maryland* v. *Louisiana*, 451 U. S. 725, 756–757 (1981), the Washington taxpayers need not prove actual discriminatory impact "by an examination of the tax burdens imposed by other States." *Ante*, at 247. I do not read the Court's decision as extending the "internal consistency" test described in *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 644–645 (1984), to taxes that are not facially discriminatory, contra, *post*, at 257–258 (SCALIA, J., concurring in part and dissenting in part), nor would I agree with such a result in these cases. See *American Trucking Assns., Inc.* v. *Scheiner*, *post*, p. 298 (O'CONNOR, J., dissenting).

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins in Part I, concurring in part and dissenting in part.

I join Part IV of the Court's opinion, upholding Washington's unapportioned wholesale tax and rejecting Tyler Pipe's claim that it did not have a sufficient nexus with Washington to give the State taxing jurisdiction. I dissent, however, from the remainder of the opinion, invalidating the State's manufacturing tax as unconstitutionally discriminatory under the Commerce Clause. The standard for discrimination adopted by the Court, which drastically limits the States' discretion to structure their tax systems, has no basis in the Constitution, and is not required by our past decisions.

I

Implicitly in these cases, *ante*, at 245–248, and explicitly in *American Trucking Assns., Inc.* v. *Scheiner*, *post*, at 284, the Court imposes on state taxes a requirement of "internal consistency," demanding that they "'be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 644 (1984) (quoting *Container Corp. of America* v. *Franchise Tax Board*, 463 U. S. 159, 169 (1983)).[1] It is clear, for the reasons given by the Court, *ante*, at 246–247, that the Washington business and occupation (B & O) tax fails that test. So would any unapportioned flat tax on multistate activities, such as the axle tax or marker fee at issue in *Scheiner*, *post*, p. 266. It is equally clear to me, however, that this internal consistency principle is nowhere to be found in the Constitution. Nor is it plainly required by our prior decisions. Indeed, in order to apply the internal consistency rule in this case, the Court is compelled to overrule a rather lengthy list of prior decisions, from *Hinson* v. *Lott*, 8 Wall. 148 (1869), to *General Motors Corp.* v. *Washington*, 377 U. S. 436 (1964), and including, as is made explicit in *Scheiner*, *post*, p. 266, *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542 (1950), *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495 (1947), and *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U. S. 285 (1935). Moreover, the Court must implicitly repudiate the approval given in dicta 10 years ago to New York's pre-1968 transfer tax on securities. See *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 330 (1977).[2] Finally, we noted only two Terms ago—and one Term after *Armco*, *supra*, was decided—that we had never held that "a State must credit a sales tax paid to another State against its own use tax." *Williams* v. *Vermont*, 472 U. S. 14, 21–22 (1985). See *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 172 (1939). If we had applied an internal consistency rule at that time, the need for such a credit would have followed as a matter of mathematical necessity. The Court's presumed basis for creating this rule now, 198 years after adoption of the Constitution, is that the reasoning of *Armco* requires it. See *Scheiner*, *post*, at 284. In my view, however, that reasoning was dictum, which we should explicitly reject. And if one insists on viewing it as holding, and thus as conflicting with decades of precedents upholding internally inconsistent state taxes, it seems to me that *Armco* rather than those numerous other precedents ought to be overruled.

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[1] The majority finds Washington's manufacturing tax exemption for local wholesalers discriminatory because it "excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State." *Ante*, at 246–247. That exclusion, however, can only be deemed *facially* discriminatory if one assumes that every State's taxing scheme is identical to Washington's.

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[2] The New York statute taxed, *inter alia*, both the sale and delivery of securities if either event occurred in New York, 429 U. S., at 321, but imposed only one tax if both events occurred in that State. While the Court invalidated as discriminatory an amendment to that law reducing the tax for in-state sales by nonresidents and placing a cap on the tax payable on transactions involving in-state sales, it also declared that the statute prior to the amendment "was neutral as to in-state and out-of-state sales." *Id.*, at 330. That is plainly not true if internal consistency is a requirement of neutrality: assuming that all States had New York's pre-1968 scheme, if sale and delivery both took place in New York, there would be a single tax, while if sale took place in New York and delivery in New Jersey, there would be double taxation.

Prior to *Armco,* the internal consistency test was applied only in cases involving apportionment of the net income of businesses that more than one State sought to tax. That was the issue in *Container Corp.*, see 463 U. S., at 169–171, the only case cited by *Armco* in support of an internal consistency rule, see 467 U. S., at 644–645, and there is no reason automatically to require internal consistency in other contexts. A business can of course earn net income in more than one State, but the total amount of income is a unitary figure. Hence, when more than one State has taxing jurisdiction over a multistate enterprise, an inconsistent apportionment scheme could result in taxation of more than 100% of that firm's net income. Where, however, tax is assessed not on unitary income but on discrete events such as sale, manufacture, and delivery, which can occur in a single State or in different States, that apportionment principle is not applicable; there is simply no unitary figure or event to apportion. That we have not traditionally applied the internal consistency test outside the apportionment context is amply demonstrated by the lengthy list of cases that the Court has (openly or tacitly) had to overrule here and in *Scheiner.*

It is possible to read *Armco* as requiring such a test in all contexts, but it is assuredly not necessary to do so. *Armco* dealt with West Virginia's 0.27% selling tax and 0.88% manufacturing tax, and its exemption from the selling tax for in-state but not out-of-state manufacturers. We discussed the internal consistency of that taxing scheme only after finding the selling tax discriminatory "[o]n its face," 467 U. S., at 642, because "[t]he tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Ibid.* Combined with the finding that the selling tax imposed on out-of-state producers could not be deemed to "compensate" for the higher manufacturing tax imposed only on West Virginia producer/sellers, *id.*, at 642–643, that was enough to invalidate the tax. We went on to address the internal consistency rule in response to the State's argument that the taxpayer had not shown "actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia." *Id.*, at 644. After reciting the internal consistency principle applicable in apportionment cases, we said that "[a] similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce," *ibid.*, regardless of "the shifting complexities of the tax codes of 49 other States . . . ." *Id.*, at 645. The holding of *Armco* thus establishes only that a facially discriminatory taxing scheme that is not internally consistent will not be saved by the claim that in fact no adverse impact on interstate commerce has occurred. To expand that brief discussion into a holding that internal consistency is always required, and thereby to revolutionize the law of state taxation, is remarkable.

Rather than use isolated language, written with no evident consideration of its potential significance if adopted as a general rule, to overturn a lengthy list of settled decisions, one would think that we would instead use the settled decisions to limit the scope of the isolated language. As the cases from the past few Terms indicate, the internal consistency test invalidates a host of taxing methods long relied upon by the States and left unhampered by Congress. We are already on shaky ground when we invoke the Commerce Clause as a self-operative check on state legislation, see Part II, *infra*, requiring us to develop rules unconstrained by the text of the Constitution. Prudence counsels in favor of the least intrusive rule possible.

Applying more traditional tests, the Washington B & O tax is valid. It is not facially discriminatory. Unlike the

West Virginia tax in *Armco*, Washington's selling tax is imposed on all goods, whether produced in-state or out-of-state. No manufacturing tax is (or could be) imposed on out-of-state manufacturers, so no discrimination is present (or possible) there. All the State does is to relieve local producer/sellers from the burden of double taxation by declining to assess a manufacturing tax on local businesses with respect to goods on which a selling tax is paid. Nor does this arrangement, notwithstanding its nondiscriminatory appearance, have discriminatory effects in and of itself. An in-state manufacturer selling in-state pays one tax to Washington; an in-state manufacturer selling out-of-state pays one tax to Washington; and an out-of-state manufacturer selling in-state pays one tax to Washington. The State collects the same tax whether interstate or intrastate commerce is involved. The tax can be considered to have discriminatory effects only if one consults what other States are in fact doing (a case-by-case inquiry that appeals to no one, *ante*, at 247) or unless one adopts an assumption as to what other States are doing. It is the latter course that the internal consistency rule adopts, assuming for purposes of our Commerce Clause determination that other States have the same tax as the tax under scrutiny. As noted earlier, I see no basis for that assumption in the tradition of our cases; and I see little basis for it in logic as well. Specifically, I see no reason why the fact that other States, by adopting a *similar* tax, might cause Washington's tax to have a discriminatory effect on interstate commerce, is of any more significance than the fact that other States, by adopting a *dissimilar* tax, might produce such a result. The latter, of course, does not suffice to invalidate a tax. To take the simplest example: A tax on manufacturing (without a tax on wholesaling) will have a discriminatory effect upon interstate commerce if another State adopts a tax on wholesaling (without a tax on manufacturing)—for then a company manufacturing and selling in the former State would pay only a single tax, while a company manufacturing in the former State but selling in the latter State would pay two taxes. When this very objection was raised in *Armco*, we replied that, unlike the situation in *Armco* itself, "such a result would not arise from impermissible discrimination against interstate commerce . . . ." 467 U. S., at 645. That response was possible there because the West Virginia tax was facially discriminatory; it is not possible here because the Washington B & O tax is not.

It seems to me that we should adhere to our long tradition of judging state taxes on their own terms, and that there is even less justification for striking them down on the basis of assumptions as to what other States *might* do than there is for striking them down on the basis of what other States *in fact* do. Washington's B & O tax is plainly lawful on its own. It may well be that other States will impose similar taxes that will increase the burden on businesses operating interstate—just as it may well be that they will impose *dis*similar taxes that have the same effect. That is why the Framers gave Congress the power to regulate interstate commerce. Evaluating each State's taxing scheme on its own gives this Court the power to eliminate evident discrimination, while at the same time leaving the States an appropriate degree of freedom to structure their revenue measures. Finer tuning than this is for the Congress.

II

I think it particularly inappropriate to leap to a restrictive "internal consistency" rule, since the platform from which we launch that leap is such an unstable structure. It takes no more than our opinions this Term, and the number of prior decisions they explicitly or implicitly overrule, to demonstrate that the practical results we have educed from the so-called "negative" Commerce Clause form not a rock but a "quagmire," *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959). Nor is this a recent liquefaction. The fact is that in the 114 years since the doctrine of the negative Commerce Clause was formally adopted as holding of this Court, see *Case of the State Freight Tax*, 15 Wall. 232 (1873), and in the 50 years prior to that in which it was alluded to in various dicta of the Court, see *Cooley* v. *Board of Wardens*, 12 How. 299, 319 (1852); *Gibbons* v. *Ogden*, 9 Wheat. 1, 209 (1824); *id.*, at 226–229, 235–239 (Johnson, J., concurring in judgment), our applications of the doctrine have, not to put too fine a point on the matter, made no sense. See generally D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, pp. 168–181, 222–236, 330–342, 403–416 (1985).[3]

That uncertainty in application has been attributable in no small part to the lack of any clear theoretical underpinning for judicial "enforcement" of the Commerce Clause. The text of the Clause states that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. On its face, this is a charter for Congress, not the courts, to ensure "an area of trade free from interference by the States." *Boston Stock Exchange*, 429 U. S., at 328. The pre-emption of state legislation would automatically follow, of course, if the grant of power to Congress to regulate interstate commerce were exclusive, as Charles Pinckney's draft constitution would have provided, see Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 434 (1941), and as John Marshall at one point seemed to believe it was. See *Gibbons* v. *Ogden*, *supra*, at 209. However, unlike the District Clause, which empowers Congress "To exercise exclusive Legislation," Art. I, § 8, cl. 17, the language of the Commerce Clause gives no indication of exclusivity. See *License Cases*, 5 How. 504, 579 (1847) (opinion of Taney, C. J.). Nor can one assume generally that Congress' Article I powers are exclusive; many of them plainly coexist with concurrent authority in the States. See *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 470, 479 (1974) (patent power); *Goldstein* v. *California*, 412 U. S. 546, 560 (1973) (copyright power); *Houston* v. *Moore*, 5 Wheat. 1, 25 (1820) (court-martial jurisdiction over the militia); *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193–196 (1819) (bankruptcy power). Furthermore, there is no correlative denial of power over commerce to the States in Art. I, § 10, as there is, for example, with the power to coin money or make treaties. And both the States and Congress assumed from the date of ratification that at least some state laws regulating commerce were valid. See *License Cases*, *supra*, at 580–581. The exclusivity rationale is infinitely less attractive today than it was in 1847. Now that we know interstate commerce embraces such activities as growing wheat for home consumption, *Wickard* v. *Filburn*, 317 U. S. 111 (1942), and local loan sharking, *Perez* v. *United States*, 402 U. S. 146 (1971), it is more difficult to imagine what state activity would survive an exclusive Commerce Clause than to imagine what would be precluded.

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[3] Professor Currie's discussion of the Commerce Clause decisions of the Marshall and Taney Courts is summed up by his assessment of the leading Taney Court decision: "Taken by itself, *Cooley* [v. *Board of Wardens*, 12 How. 299 (1852),] may appear arbitrary, conclusory, and irreconcilable with the constitutional text. Nevertheless, anyone who has slogged through the Augean agglomeration preceding Curtis's labors must find them scarcely less impressive than those of the old stable-cleaner himself." D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 234 (1985). He concludes his discussion of the Chase Court's Commerce Clause jurisprudence by noting: "In doctrinal terms the Court's efforts in this field can be described only as a disaster." *Id.*, at 342 (footnote omitted). And the Waite Court receives the following testimonial: "It is a relief that with the *Bowman* decision [*Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888),] we have reached the end of the commerce clause decisions of the Waite period, for they do not make elevating reading." *Id.*, at 416 (footnote omitted). Future commentators are not likely to treat recent eras much more tenderly.

Another approach to theoretical justification for judicial enforcement of the Commerce Clause is to assert, as did Justice Curtis in dicta in *Cooley* v. *Board of Wardens*, *supra*, at 319, that "[w]hatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." That would perhaps be a wise rule to adopt (though it is hard to see why judges rather than legislators are fit to determine what areas of commerce "in their nature" require national regulation), but it has the misfortune of finding no conceivable basis in the text of the Commerce Clause, which treats "Commerce . . . among the several States" as a unitary subject. And attempting to limit the Clause's pre-emptive effect to state laws *intended* to regulate commerce (as opposed to those intended, for example, to promote health), see *Gibbons* v. *Ogden*, *supra*, at 203, while perhaps a textually possible construction of the phrase "regulate Commerce," is a most unlikely one. Distinguishing between laws with the *purpose* of regulating commerce and "police power" statutes with that *effect* is, as Taney demonstrated in the *License Cases*, *supra*, at 582–583, more interesting as a metaphysical exercise than useful as a practical technique for marking out the powers of separate sovereigns.

The least plausible theoretical justification of all is the idea that in enforcing the negative Commerce Clause the Court is not applying a constitutional command at all, but is merely interpreting the will of Congress, whose silence in certain fields of interstate commerce (but not in others) is to be taken as a prohibition of regulation. There is no conceivable reason why congressional inaction under the Commerce Clause should be deemed to have the same pre-emptive effect elsewhere accorded only to congressional action. There, as elsewhere, "Congress' silence is just that—silence . . . ." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 686 (1987). See Currie, *supra* n. 3, at 334 (noting "the recurring fallacy that in some undefined cases congressional inaction was to be treated as if it were permissive or prohibitory legislation—though the Constitution makes clear that Congress can act only by affirmative vote of both Houses" (footnotes omitted)).[4]

The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce. The strongest evidence in favor of a negative Commerce Clause—that version of it which renders federal authority over interstate commerce exclusive—is Madison's comment during the Convention: "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States." 2 M. Farrand, Records of the Federal Convention of 1787, p. 625 (1937). This comment, however, came during discussion of what became Art. I, § 10, cl. 3: "No State shall, without the Consent of Congress, lay any Duty of Tonnage . . . ." The fact that it is difficult to conceive how the power to regulate commerce would *not* include the power to impose duties; and the fact that, despite this apparent coverage, the Convention went on to adopt a provision prohibiting States from levying duties on tonnage without congressional approval; suggest that Madison's assumption of exclusivity of the federal commerce power was ill considered and not generally shared.

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[4] Unfortunately, this "legislation by inaction" theory of the negative Commerce Clause seems to be the only basis for the doctrine, relied upon by the Court in *Scheiner, post,* at 289, n. 23, that Congress can authorize States to enact legislation that would otherwise violate the negative Commerce Clause. See *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408 (1946). Nothing else could explain the *Benjamin* principle that what was invalid state action can be rendered valid state action through "congressional consent." There is surely no area in which Congress can permit the States to violate the Constitution. Thus, in *Cooley* v. *Board of Wardens,* 12 How. 299 (1852), Justice Curtis, to whom there had not occurred the theory of congressional legislation by inaction, wrote of the relationship between States and the negative Commerce Clause as follows: "If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this Act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power." *Id.,* at 318.

Against this mere shadow of historical support there is the overwhelming reality that the Commerce Clause, in its broad outlines, was not a major subject of controversy, neither during the constitutional debates nor in the ratifying conventions. Instead, there was "nearly universal agreement that the federal government should be given the power of regulating commerce," Abel, 25 Minn. L. Rev., at 443–444, in much the form provided. "The records disclose no constructive criticisms by the states of the commerce clause as proposed to them." F. Frankfurter, The Commerce Clause under Marshall, Taney and Waite 12 (1937). In The Federalist, Madison and Hamilton wrote numerous discourses on the virtues of free trade and the need for uniformity and national control of commercial regulation, see The Federalist No. 7, pp. 62–63 (C. Rossiter ed. 1961); *id.*, No. 11, pp. 89–90; *id.*, No. 22, pp. 143–145; *id.*, No. 42, pp. 267–269; *id.*, No. 53, p. 333, but said little of substance specifically about the Commerce Clause—and that little was addressed primarily to foreign and Indian trade. See generally Abel, *supra*, at 470–474. Madison does not seem to have exaggerated when he described the Commerce Clause as an addition to the powers of the National Government "which few oppose and from which no apprehensions are entertained." The Federalist No. 45, p. 293. I think it beyond question that many "apprehensions" would have been "entertained" if supporters of the Constitution had hinted that the Commerce Clause, despite its language, gave this Court the power it has since assumed. As Justice Frankfurter pungently put it: "the doctrine that state authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community . . . [is] an audacious doctrine, which, one may be sure, would hardly have been publicly avowed in support of the adoption of the Constitution." Frankfurter, *supra*, at 19.

In sum, to the extent that we have gone beyond guarding against rank discrimination against citizens of other States—which is regulated not by the Commerce Clause but by the Privileges and Immunities Clause, U. S. Const., Art. IV, §2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States")—the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* SCHEINER, SECRETARY, DEPARTMENT OF REVENUE OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 86–357. Argued April 28, 1987—Decided June 23, 1987

This case presents the question whether the Commerce Clause of the Federal Constitution is violated by two Pennsylvania statutes which impose lump-sum annual taxes on the operation of trucks on Pennsylvania's highways. One challenged statute requires that an identification marker be affixed to every truck over a specified weight, and imposes an annual flat fee ($25 from 1980 through March 1983) for such marker. The statute exempts trucks registered in Pennsylvania by providing that the marker fee shall be deemed a part of the vehicle registration fee (which was increased when the $25 marker fee was enacted). The marker fee was reduced to $5 (the administrative cost of issuing the marker) in 1982, when Pennsylvania enacted the second challenged statute, which, in general, imposes an annual axle tax on all trucks over a specified weight using Pennsylvania highways, and is assessed at the rate of $36 per vehicle axle. The same statute that enacted the axle tax also reduced the registration fees for pertinent vehicle-weight classes by the amount of the axle tax usually applicable to vehicles in such classes. Appellant organizations, which represent interstate motor carriers whose vehicles are registered outside of Pennsylvania and who paid the $25 marker fee while it was in effect and are subject to the axle tax, brought separate actions in the Commonwealth Court of Pennsylvania challenging the constitutionality of the $25 marker fee and of the axle tax on the ground, *inter alia*, that both taxes discriminated against interstate commerce since the entire economic burden of each tax fell on out-of-state vehicles because the 1980 statute "deemed" the marker fee for Pennsylvania vehicles to be a part of the registration fee, and the 1982 legislation granted Pennsylvania vehicles a reduction in registration fees that offset the newly imposed axle tax. The court accepted appellants' argument and held that the challenged taxes were unconstitutional. The Pennsylvania Supreme Court considered the cases together and reversed.

Held:

1. The challenged taxes are unconstitutional because the methods by which they are assessed discriminate against interstate commerce in a way that contradicts the Commerce Clause's central purpose of guaran-

teeing a free trade area among States. The Clause prohibits a State, as here, from imposing a tax that places a much heavier burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in interstate commerce. The challenged taxes do not pass the "internal consistency" test under which a state tax must be of a kind that, if applied by every jurisdiction, there would be no impermissible interference with free trade. The challenged taxes' inevitable effect is to threaten the free movement of commerce by placing a financial barrier around Pennsylvania. Pp. 280–287.

2. The challenged taxes cannot be upheld on the ground that they reflect a reasonable charge for the privilege of using Pennsylvania's roads when considered alongside the high price that Pennsylvania-based trucks pay in registration fees. There is no merit to the contention that the axle tax does not discriminate against interstate commerce because domestic trucks, through payment of the registration fees, pay a higher price to use Pennsylvania's highways than those registered in other States. Pp. 287–289.

3. Nor can the challenged taxes be upheld on the ground that they are no different from flat user fees recently upheld in other cases. *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U. S. 707, and *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, distinguished. Pp. 289–292.

4. Earlier cases that support a State's authority to impose flat use taxes can no longer suffice to uphold flat taxes with the blatantly discriminatory consequences associated with Pennsylvania's marker fee and axle tax. More recent decisions have rejected the approach to the Commerce Clause taken in the earlier cases that focused primarily on the character of the privilege rather than the practical consequences of the tax. A flat tax may not be upheld merely because the particular formula by which its charges are reckoned extends the same nominal privilege to interstate commerce that it extends to in-state activities. Although out-of-state carriers obtain a privilege to use Pennsylvania's highways that is nominally equivalent to that which local carriers receive, imposition of the challenged taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause. While flat taxes may be valid when administrative difficulties make collection of more finely calibrated user charges impracticable, such justification is unavailable with regard to Pennsylvania's unapportioned marker fee and axle tax. Pp. 292–297.

510 Pa. 430, 509 A. 2d 838, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and POWELL, J., joined, *post*, p. 298. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 303.

Stephen M. Shapiro argued the cause for appellants. With him on the briefs were *Andrew L. Frey*, *Kenneth S. Geller*, *Mark I. Levy*, *Daniel R. Barney*, *Robert Digges, Jr.*, *William S. Busker*, and *Walter Hellerstein*.

Suellen M. Wolfe, Chief Deputy Attorney General of Pennsylvania, argued the cause for appellees. With her on the brief were *LeRoy S. Zimmerman*, Attorney General, *Andrew S. Gordon*, Chief Deputy Attorney General, *Bryan E. Barbin* and *Michael A. Roman*, Deputy Attorneys General, and *Allen C. Warshaw*.*

JUSTICE STEVENS delivered the opinion of the Court.

Again we are "asked to decide whether state taxes as applied to an interstate motor carrier run afoul of the commerce clause, Art. I, § 8, of the Federal Constitution." *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S.

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*Briefs of *amici curiae* urging reversal were filed for the State of North Carolina et al. by *Lacy H. Thornburg*, Attorney General of North Carolina, *Jane P. Gray*, Special Deputy Attorney General, and *David L. Wilkinson*, Attorney General of Utah; for the State of Oklahoma by *Michael C. Turpen*, Attorney General, and *Richard Mildren*, Assistant Attorney General; for the Canadian Trucking Association by *William H. Shawn* and *Kim D. Mann;* and for Yellow Freight System, Inc., et al. by *Lester M. Bridgeman*.

Briefs of *amici curiae* urging affirmance were filed for the State of Arkansas by *Steve Clark*, Attorney General, *Chris Parker*, and *Ted Goodloe;* for the State of New Jersey by *W. Cary Edwards*, Attorney General, and *Michael R. Clancy* and *Mary R. Hamill*, Deputy Attorneys General; for the State of Vermont by *Michael H. Gottesman*, *Jeffrey L. Amestoy*, Attorney General, and *Thomas R. Viall* and *Robert C. Schwartz*, Assistant Attorneys General; and for the Transportation Cabinet of the Commonwealth of Kentucky by *David Armstrong*, Attorney General of Kentucky, *A. Stephen Reeder*, Special Assistant Attorney General, *James R. Cox*, and *Janet P. Jakubowicz*.

495, 496 (1947). That statement of the question presented might equally well have introduced the Court's opinion in either *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), or *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), which overruled *Spector*. In this case we review the Supreme Court of Pennsylvania's judgment upholding the constitutionality of two Pennsylvania statutes which impose lump-sum annual taxes on the operation of trucks and truck tractors. Our task is by no means easy; the uneven course of decisions in this field reflects the difficulties of reconciling unrestricted access to the national market with each State's authority to collect its fair share of revenues from interstate commercial activity.

Appellants claim that these Pennsylvania statutes violate the principle that no State may discriminate against interstate commerce by enacting a tax which provides a competitive advantage to local business.[1] The Pennsylvania Supreme Court upheld the taxes, interpreting them as facially neutral and in accord with a line of our decisions in the pre-*Spector* era approving flat taxes imposed on interstate truckers for the privilege of using a State's highway system. Before turning to the judgment of the State Supreme Court, we first describe the challenged taxes in some detail in the context of the State's revenue-gathering system and explain why we find persuasive appellants' claims of discrimination. Despite appellees' defense of the revenue provisions as valid compensatory, user-fee, or flat taxes, the judgment of the State Supreme Court must be reversed.

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[1] "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to commercial business.' [*Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959)]. . . . Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects. *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 356 (1951)." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 329 (1977).

I

The Commonwealth of Pennsylvania spends large sums of money to improve and maintain its highways and bridges.[2] Passenger and cargo vehicles travel billions of miles on these highways every year.[3] Operators of large trucks and tractor trailers engaged in interstate commerce make particularly heavy use of the State's highways. Their vehicles, which may be classified by the number of their axles or by their gross weight—ranging from less than 5,000 pounds for the smallest class to 79,001–80,000 pounds for the 25th class—not only transport cargo between Pennsylvania and out-of-state locations, but also use Pennsylvania's highways extensively as corridors connecting the States of the Northeast, the Southeast, and the Midwest.[4] Because of their weight and size, trucks using the State's roads require the State to make higher road-related expenditures than would use of the roads by smaller vehicles alone. App. 30. The State's hilly terrain and frequently severe weather conditions enhance the

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[2] For example, during the period from April 1, 1981, through November 30, 1982, the expenditures from Pennsylvania's Motor License Fund that directly benefited motor carriers operating in Pennsylvania were at least $1,551,088,000. App. 30.

[3] "During calendar year 1979, the most recent period for which detailed figures are currently available, vehicle miles travelled in Pennsylvania were approximately as follows:

"Total Vehicle Miles Travelled, 1979

"Total Passenger Vehicles	58,600,811,505
Auto	57,291,004,547
Motor Cycle	911,913,897
School Bus	124,376,972
Commercial Bus	273,516,089
"Total Cargo Vehicles	12,844,167,335
2 Axle/4 tire	6,381,130,943
All other Single Trucks	2,806,356,994
Combination Trucks	3,656,679,398"

Id., at 31–32.

[4] For example, the States of New York, New Jersey, Delaware, Maryland, West Virginia, and Ohio share borders with Pennsylvania.

costs of highway maintenance. 510 Pa. 430, 433, 509 A. 2d 838, 840 (1986).

These expenditures are financed, in substantial part, by three types of levies on users of Pennsylvania's highways: vehicle registration fees, fuel consumption taxes, and lump-sum annual fees which we will describe as "flat taxes." Although the two taxes at issue in this litigation are both flat taxes—a $25 "marker fee" assessed from August 18, 1980, through March 31, 1983, and an "axle tax" imposed thereafter—registration fees and fuel taxes are principal sources of revenue for road-related purposes and therefore the mechanics of their collection provide necessary background for our analysis of the economic significance and constitutional validity of the challenged flat taxes.

Registration Fees

Owners of motor vehicles that are based in Pennsylvania must register them with the Department of Transportation and pay an annual registration fee. The weight of a truck or truck tractor[5] determines the amount of the annual fee. Prior to 1980, there were 20 weight classifications, and the corresponding fees ranged from $39 to $606 per vehicle. App. 260. In 1980, the registration fees were increased and five new weight classes for heavier vehicles were added to the statutory schedule; from 1980 to 1982 the maximum registration fee was $1,125, for a vehicle weighing 79,001 to 80,000 pounds. *Ibid.* In 1982, the registration fees for vehicles weighing more than 26,000 pounds (classes 9–25) were reduced by multiples of $36 ranging up to a $180 reduction; thereafter, the maximum fee was $945. *Ibid.*

Pennsylvania, many other States, and Provinces of Canada participate in an apportioned registration scheme called the "International Registration Plan" (IRP). Participants in this plan share the registration fees for vehicles based in their States with other IRP States in which the vehicles travel. The percentage of each vehicle's total registration fee that is allocated to each IRP State other than the State in which the vehicle is based is determined by dividing the total number of miles the vehicle traveled within the IRP State during the preceding year by its total mileage. The total fee payable to each State is the product of each State's total fee for full registration of each vehicle and that State's percentage share of the vehicle's mileage. Thus, if 30% of the mileage of a Pennsylvania-based vehicle was accrued in other States, Pennsylvania's share of the registration fee would be 70% of the full amount specified in its statutory schedule. On the other hand, if a vehicle based in another IRP State logged 40% of its mileage in Pennsylvania, its owner would be required to pay that portion of the Pennsylvania fee schedule to Pennsylvania.[6] Pennsylvania collects no registration fees from motor carriers based in non-IRP States and, conversely, Pennsylvania-based vehicles pay no registration fees to non-IRP States.[7]

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[5] A truck tractor does not itself carry cargo but is equipped to haul cargo trailers.

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[6] The parties stipulated to this example:

"[A]ssuming a motor carrier vehicle based in Pennsylvania, state A or state B traveled 50% of its miles in the Commonwealth, 40% in state A, and 10% in state B, and assuming the full registration fees for those states were $400, $300, and $200 respectively, the registration fees paid by that vehicle would be as follows (if states A and B are IRP-member jurisdictions . . .):

"To Pennsylvania:	50% x $400 = $200
To state A:	40% x $300 = $120
To state B:	10[%] x $200 = $ 20
Total registration fee:	$340"

App. 38–39.

[7] Thus, if the example used in n. 6, *supra*, is modified by assuming that State A is not an IRP State, 90% of Pennsylvania's $400 fee, or $360, would be payable to Pennsylvania; in that event, the total registration would be $380, of which $20 would be payable to State B.

Pennsylvania also has nonapportioned reciprocity agreements with non-IRP States. A Pennsylvania-based carrier that pays a registration fee

In sum, the amount of each truck's registration fee is determined by the weight of the vehicle and, if the truck travels in other IRP States, in part by its in-state mileage. No vehicle is required to pay more than one full registration fee.

Fuel Consumption Taxes

Pennsylvania collects a fuel consumption tax in two ways. It imposes a per-gallon fuel tax on fuel purchased within the State. The State also requires trucks that travel less than 90% of their miles in Pennsylvania to pay a tax based on their miles traveled in Pennsylvania, reduced by the amount of the tax actually paid through fuel purchased at Pennsylvania pumps. See Pa. Stat. Ann., Tit. 72, §§2611d, 2614.4, and 2617.1–2617.26 (Purdon 1964 and Supp. 1987). The amount of these taxes does not depend on the vehicle's State of registration.

The Flat Taxes

Pennsylvania requires an identification marker issued by the Department of Revenue to be affixed to every motor carrier vehicle. A motor carrier vehicle is a "truck, truck tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds." 75 Pa. Cons. Stat. § 102 (1984). Until 1980, the fee for the issuance of this marker was $2. In that year the fee was increased to $25, but vehicles registered in Pennsylvania were exempted from the fee. The statute effected this exemption by providing that for each vehicle registered in Pennsylvania the "marker fee shall

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to Pennsylvania obtains the privilege of operating the vehicle over the highways of "all other states with which Pennsylvania has registration reciprocity respecting that vehicle registration." *Id.*, at 42. Likewise, carriers that pay registration fees to States with which Pennsylvania has reciprocity agreements receive the privilege of operating their vehicles on the roads of their home state and "the roads of all other states, including Pennsylvania, with which the home state has registration reciprocity." *Ibid.*

be deemed a part of and included in the vehicle registration fee." § 2102(b).

The parties have stipulated that the administrative costs associated with the issuance of the identification markers total approximately $5 per vehicle. App. 22. In 1982, when it enacted the axle tax, Pennsylvania reduced the annual marker fee from $25 to $5 per vehicle. § 2102(b). Since 1982, then, the marker fee is sufficient only to meet the specific cost of issuing the marker, but the effect of the $25 marker fee from 1980 to 1982 was to impose a flat tax on vehicles registered in other States. This tax was, at least nominally, not imposed on Pennsylvania-registered vehicles. It should be noted, however, that the same statute that increased the marker fee in 1980 to $25 for out-of-state vehicles weighing more than 17,000 pounds also increased Pennsylvania's registration fees for such vehicles by amounts substantially larger than $25.

In 1982, Pennsylvania enacted its axle tax and, as noted, reduced the marker fee to $5 per vehicle. The axle tax applies to all trucks, truck tractors, and combinations weighing more than 26,000 pounds, whether registered in Pennsylvania or elsewhere; it requires an annual payment of $36 per vehicle axle. 75 Pa. Cons. Stat. § 9902 (1984). For example, the tax is $72 for a two-axle vehicle and $180 for a five-axle vehicle. If a truck travels less than 2,000 miles in Pennsylvania, however, it is entitled to a rebate: the axle tax paid multiplied by the ratio of the amount by which the vehicle's in-state mileage was short of 2,000 miles to 2,000 determines the rebate amount. § 9905. Moreover, the axle tax is excused when a trucker pays $25 for a trip permit for a period not exceeding five days. § 2102(d).

The same statute that enacted the axle tax in 1982 also reduced the registration fees for all weight classes of vehicles of more than 26,000 pounds. In classes 9–12, which generally include two-axle vehicles required to pay a $72 axle tax, the reduction amounted to $72; in classes 13–17, which usually include three-axle vehicles subject to a $108 axle tax, it amounted to $108; in classes 18, 19, and 20, usually four-axle vehicles subject to a $144 axle tax, it amounted to $144, and in the five heaviest classes—vehicle weights exceeding the permissible weight for four-axle vehicles—it amounted to $180.[8] In brief, the amounts of the reductions in all classes were a multiple of the $36 per axle which is used as the measure for the axle tax. App. 260.

II

Appellants represent a class of interstate motor carriers whose vehicles are registered outside of Pennsylvania and who paid the $25 marker fee while it was in effect and who have thereafter been subject to the axle tax. They brought separate actions in the Commonwealth Court of Pennsylvania challenging the constitutionality of the $25 marker fee and of the axle tax. In each case, appellants made two separate arguments based on the Commerce Clause of the Federal Constitution.

First, they argued that the entire economic burden of each tax fell on out-of-state vehicles because the 1980 statute "deemed" the marker fee for Pennsylvania vehicles to be a part of the registration fee, and the 1982 legislation granted Pennsylvania vehicles a reduction in registration fees that neatly offset the newly imposed axle tax. Second, they argued that even if owners of vehicles registered in Pennsylvania, through payment of registration fees, shared the burden of the two flat taxes with owners of vehicles based elsewhere, the taxes were nevertheless discriminatory because both taxes imposed a much heavier charge per mile of highway usage by out-of-state vehicles. On the average, the Pennsylvania-based vehicles subject to the flat taxes travel about five times as many miles on Pennsylvania roads as do the out-of-state vehicles; correspondingly, the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles.[9] Although out-of-state and in-state vehicles subject to the axle tax traveled approximately the same number of miles on Pennsylvania's highways, less than one-sixth of the State's total axle tax revenues were generated by Pennsylvania-based vehicles in fiscal years 1982–1983 and 1983–1984.[10]

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[8] The explanation for the substantial congruence between the amount of the reductions in registration fee and the amount of axle tax imposed lies in the statutory requirement that a truck with a given number of axles may not exceed a specified weight. As Chief Justice Nix explained in his dissent, the registration fee "reductions correspond to the number of axles most commonly used and minimally required by law in each weight class. . . . Except in a few instances, the [registration fee] reductions created by the Act were intended to and did exactly offset the impact of the Axle Tax upon motor carrier vehicles registered in Pennsylvania." 510 Pa. 430, 467, n. 1, 509 A. 2d 838, 858, n. 1 (1986). The Commonwealth Court had also found that the reductions in registration fees "generally offset the tax owed based on the number of axles ordinarily required of vehicles within each affected weight class." *American Trucking Assns., Inc.* v. *Bloom*, 87 Pa. Commw. 379, 382, 487 A. 2d 465, 467 (1985).

In both the marker fee case and the axle tax case the Commonwealth Court accepted appellants' first argument and did not consider the second. In the first case, the court reasoned:

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[9] In 1981 the cost of the marker fee was more than ½ cent per mile for all foreign-based motor carrier vehicles and about 1/10 cent per mile for all Pennsylvania-based motor carrier vehicles. App. 104.

[10] In an affidavit supporting appellee's motion for summary judgment, the Secretary of the Department of Revenue stated:

"Axle tax revenues for fiscal year 1982–83 and fiscal year 1983–84 are as follows:

"Trucks registered in Pennsylvania	Trucks registered other than Pa.	Temporary Permits	Fines	Total
$ 8,684,008	$45,292,372	$1,147,855	–	$55,124,235
$12,314,308	$62,088,820	$4,547,849	$1,448,872	$80,399,849

"The Department of Revenue is in the process of paying axle tax rebates for the April 1, 1983 to March 31, 1984 period and estimates that rebates will total about $6,000,000." App. 207.

> "A state tax on interstate commerce does not offend the Commerce Clause . . . if that tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274[, 279] (1977). . . . Section 2102(b) facially fails the third prong of the *Complete Auto* standard which prohibits discrimination against interstate commerce. Notwithstanding legislative legerdemain in the insertion of the obfuscating term 'deemed,' Pennsylvania-registered vehicles were *exempted* from, and foreign-registered vehicles were *subject* to, the marker decal fee. 'The commerce clause forbids discrimination, whether forthright or ingenious.' *Best & Co.* v. *Maxwell*, 311 U. S. 454, 455 (1940) (footnote omitted)." *American Trucking Assns., Inc.* v. *Bloom*, 77 Pa. Commw. 575, 581, 466 A. 2d 755, 757 (1983).

The Commonwealth Court ordered a refund of marker fee payments made after April 1, 1982. *Id.*, at 581–582, 466 A. 2d, at 758. Sitting en banc, the Commonwealth Court overruled defendants' exceptions to the trial judge's order. *American Trucking Assns., Inc.* v. *Bloom*, 87 Pa. Commw. 345, 487 A. 2d 468 (1985). The en banc court inferred from the legislature's nonenactment of increased registration fees to keep pace with the marker levy imposed on vehicles based outside of Pennsylvania "a legislative intent to exempt Pennsylvania-registered motor carriers from payment of the $25.00 marker fee." *Id.*, at 350, 487 A. 2d, at 471.

Appellants in the case challenging the axle tax represent a class of all interstate motor carriers who own vehicles registered outside of Pennsylvania who are or will be subject to the tax, and a subclass consisting of such interstate motor carriers who are registered in any of the States or the Provinces of Canada that are not members of the IRP. Appellants contended that the axle tax, together with the simultaneous reduction in registration fees substantially offsetting the axle tax for Pennsylvania-registered vehicles, is facially discriminatory and in practice imposes the axle tax only on interstate motor carriers registered outside of Pennsylvania. Appellants also argued that the axle tax is an invalid flat tax wholly unrelated to the benefits received by interstate motor carriers. Sitting en banc, the Commonwealth Court declared that the axle tax violated the Commerce Clause and ordered a refund of axle tax payments made by affected class members after April 1, 1983. 87 Pa. Commw. 379, 487 A. 2d 465 (1985). The court found that operators of foreign-registered vehicles bore the "full brunt of the tax" and concluded that the axle tax therefore "constitutes economic protectionism and is facially invalid." *Id.*, at 383, 487 A. 2d, at 467.

The Supreme Court of Pennsylvania considered the two cases together and reversed. 510 Pa. 430, 509 A. 2d 838 (1986).[11] The Court began its analysis by noting that the prohibition against discrimination was included in the four-part test stated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), and that it was essential to focus on the "effect or economic consequences of the state tax upon interstate commerce." 510 Pa., at 449, 509 A. 2d, at 848.

Pursuing this inquiry, the State Supreme Court rejected the trial court's conclusion that the full burden of both taxes was imposed on foreign-registered vehicles. With respect to the marker fee, the Court considered irrelevant the legislative history supporting a contrary inference, because the plain language of the statute "deemed" a portion of the registration fee to constitute payment of the marker fee for Pennsylvania vehicles. The Court thus found no discrimination in the operation of the marker fee because the statute "imposed a $25.00 marker fee on all motor carriers in the class represented by appellees and deemed a like amount of the simultaneous increase in Pennsylvania registration fees as the marker fee for Pennsylvania registered vehicles." *Id.*, at 453, 509 A. 2d, at 850. Moreover, even if the statute had not explicitly provided that Pennsylvania-registered vehicles are regarded as having paid a marker fee, the simultaneous increase in the registration fee when the $25 marker fee was enacted made it "apparent that the marker fee does not work *any* discrimination against interstate commerce in practical operation." *Ibid.*

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[11] A third case, involving a refund claim for the two years that the $25 marker fee was in effect, presented the same legal issue as the other two. The Commonwealth Court held that it did not have jurisdiction over the case because appellants had not initially sought refunds from the Board of Finance and Revenue. 87 Pa. Commw. 418, 489 A. 2d 269 (1985). The Pennsylvania Supreme Court considered this third case along with the other two. In view of its rejection in the first case of the constitutional challenges to the marker fee, the court affirmed without reviewing the Commonwealth Court's ruling on the exhaustion issue.

The court thus viewed the marker fee as a flat tax applied equally on all vehicles using the State's highways. The court offered two reasons why this flat tax was not discriminatory despite its imposition of a greater cost per mile on non-Pennsylvania registered vehicles. First, relying on our opinions in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972), and *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981), the Court reasoned that a State may impose a tax for the privilege of using its highways "so long as the flat fee charged is not manifestly disproportionate to the services rendered." 510 Pa., at 457, 509 A. 2d, at 852. Second, the Court found that interstate motor carriers could not protest that the burden of the flat fee fell too heavily upon them, for they "are free to use the Commonwealth's highways as often and for whatever distances they wish." *Ibid.*

In the axle tax case, the Court found that the tax was collected from Pennsylvania and non-Pennsylvania-registered vehicles alike and thus presented no question of discrimination "[o]n its face and in actual operation." *Id.*, at 459, 509 A. 2d, at 853. The Court acknowledged that a difficulty arose when it considered the tax together with the statutory reduction in 1982 of registration fees paid by Pennsylvania-based vehicles subject to the axle tax, but concluded that even though the reduction in registration fees offset the axle taxes for Pennsylvania-based vehicles, this reduction had to be viewed against the earlier increase in 1980 of registration fees. According to the State Supreme Court, the net effect of the restructuring of the tax system over the 2-year period was "to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme." *Id.*, at 462, 509 A. 2d, at 855. Taking all provisions of the State's highway user-fee system into account, the court reasoned that members of appellants' class bore less of the tax burden than Pennsylvania-registered motor vehicles. *Id.*, at 460–463, 509 A. 2d, at 854–855. The Court concluded that "in easing the burden on Pennsylvania registered vehicles, the Commonwealth has neither disadvantaged interstate commerce nor favored local commerce, and the axle tax does not, therefore, discriminate against interstate commerce." *Id.*, at 462, 509 A. 2d, at 855.

III

Although we have described our own decisions in this area as a "quagmire" of judicial responses to specific state tax measures, *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 457–458 (1959), we have steadfastly adhered to the central tenet that the Commerce Clause "by its own force created an area of trade free from interference by the States." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 328 (1977). See also *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 642 (1984). One primary consequence of this constitutional restriction on state taxing powers, frequently asserted in litigation, is that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Ibid.;* see also *Westinghouse Electric Corp.* v. *Tully*, 466

U. S. 388, 403 (1984). In its guarantee of a free trade area among States, however, the Commerce Clause has a deeper meaning that may be implicated even though state provisions, such as the ones reviewed here, do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory.[12]

The parties broadly state the constitutional question in this appeal as whether Pennsylvania's flat taxes result in a blanket discrimination against interstate commerce. The operator of a Pennsylvania-based vehicle that engages in interstate commerce, however, has no apparent quarrel with the challenged flat taxes; he is "deemed" to pay the $25 marker fee through his registration fee, and the axle taxes he paid beginning in 1982 were generally offset by the statutory reduction in vehicle registration fees. But some operators of vehicles based in other States or Provinces have neither consolation, for they have paid registration fees to their own jurisdictions and still face Pennsylvania's axle taxes. The precise issue is therefore more subtle: do the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause? We find dispositive those of our precedents which make it clear that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States.[13]

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[12] Our more recent cases repeat a theme that recurred in an early series of decisions invalidating facially neutral taxes on nonresident solicitors, or "drummers," seeking to engage in business within the taxing jurisdiction. In *Nippert* v. *Richmond*, 327 U. S. 416 (1946), we explained:

"As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden. For, though 'interstate business must pay its way,' a State consistently with the commerce clause cannot put a barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce with foreign Nations, and among the several States . . . [.]' Nor may the prohibition be accomplished in the guise of taxation which produces the excluding or discriminatory effect." *Id.*, at 425–426.

"Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against. It may be, as the Court said in the *Berwind-White* case, that the State is free to allow its municipal subdivisions to erect such barriers against each other, to some extent, as to the commerce over which the State has exclusive control. It cannot so outlaw or burden the commerce of the United States.

"The drummer is a figure representative of a by-gone day. But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify." *Id.*, at 434–435.

The way in which a tax levied on participants in interstate commerce is measured and assessed bears directly on whether it implicates central Commerce Clause values. The method of assessing the marker and axle taxes in this case on Pennsylvania-based vehicles and on other vehicles establishes that the State is not treating the two types of vehicles with an even hand. There are important and obvious differences of a constitutional magnitude between the State's registration fees and fuel taxes, on the one hand, and its flat taxes, on the other.

The State's vehicle registration fee has its counterpart in every other State and the District of Columbia. See 2 CCH State Tax Guide ¶¶ 50-200—50-940 (2d ed. 1986). It is a tax that readily satisfies the test of "internal consistency" that we have applied in other contexts.[14] Under this test, even though the registration fee is assessed, as indeed it has been, by every jurisdiction, it causes no impermissible interference with free trade because every State respects the registration of every other State. Payment of one registration fee enables a carrier to operate a vehicle either locally or in the interstate market. Having paid one registration fee, a vehicle may pass among the States as freely as it may roam the State in which it is based; the Commerce Clause is not offended when state boundaries are economically irrelevant.

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[13] "This free trade purpose [of the Commerce Clause] is not confined to the freedom to trade with only one State; it is a freedom to trade with any State, to engage in commerce across all state boundaries.

"There has been no prior occasion expressly to address the question whether a State may tax in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses, but the clear import of our Commerce Clause cases is that such discrimination is constitutionally impermissible." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S., at 335.

Yet even if more than one jurisdiction applies a charge to participants in interstate commerce, the Commerce Clause may be satisfied if the revenue measures maintain state boundaries as a neutral factor in economic decisionmaking. Pennsylvania's fuel consumption taxes, for example, do not hinder the maintenance of a free trade area among States. The fuel consumption taxes are directly apportioned to the mileage traveled in Pennsylvania; they are therefore simply payments for traveling a certain distance that happens to be within Pennsylvania. When a vehicle uses other States' roads, it may be subject to their fuel taxes, but the free trade area is unimpaired; if one sovereign controlled the entire free trade area, it would have the equivalent authority to impose a charge for the use of all of its roads.[15]

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[14] See *Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, *ante*, at 247; *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 644–645 (1984); *Container Corp. of America* v. *Franchise Tax Board*, 463 U. S. 159, 163 (1983).

[15] It might be objected that if other States impose lower fuel taxes or forgo them entirely, then Pennsylvania's tax is inconsistent with a free trade area because it furnishes a disincentive to travel throughout that State. But the disincentive affects local and out-of-state vehicles in precisely the same way, and thus does not implicate the Commerce Clause. When a tax does establish a difference in treatment, however, the "immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment." *Freeman* v. *Hewit*, 329 U. S. 249, 256 (1946). The adverse

The unapportioned flat taxes, however, penalize some travel within the free trade area. Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc.* v. *Hardesty*, 467 U. S., at 644. If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.[16]

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economic impact in dollars and cents upon a participant in interstate commerce for crossing a state boundary and thus becoming subject to another State's taxing jurisdiction is neither necessary to establish a Commerce Clause violation, see *Armco Inc.* v. *Hardesty*, 467 U. S., at 644, nor sufficient, see *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 289 (1977) (taxes on interstate business are not invalid *per se*).

[16] A line of cases invalidating unapportioned flat taxes that provided general revenue also illustrates the principle that the very nature of the market that interstate operators serve prevents them from making full use of the privilege of doing business for which they have paid the State. Thus, we found that a tax on drummers in the city of Memphis for the privilege of doing business there on behalf of out-of-state firms discriminated against out-of-state manufacturers. We reasoned that their local competitors, "having regular licensed houses of business [in Memphis], have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis." *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 498 (1887). See also *Best & Co.* v. *Maxwell*, 311 U. S. 454, 456–457 (1940) (annual flat tax on those who were not regular retail merchants in the State invalid because its actual effect "is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language"); *Nippert* v. *Richmond*, 327 U. S. 416 (1946). As one commentator observed almost half a century ago:

Although the actual imposition of flat taxes by other jurisdictions is not necessary to sustain the Commerce Clause challenge to Pennsylvania's flat taxes under the "internal consistency" test, the adoption of these flat taxes by other jurisdictions even before the Pennsylvania suits were resolved surely suggests that acquiescence in these flat taxes would occasion manifold threats to the national free trade area. Since 1980 when Pennsylvania authorized the $25 marker fee, six other States have also adopted flat taxes[17] and seven States have adopted retaliatory levies that are assessed on motor carrier vehicles that are based in Pennsylvania or another flat-tax State.[18] Such taxes[19] can obviously divide and disrupt the market for interstate transportation services.[20]

"True, each fee is imposed upon the use of different states' highways, but the cumulative effect does not result from the mileage or distance traveled, but from the interstate character of the journey. The same mileage in one state would result in only one tax." Lockhart, State Tax Barriers to Interstate Trade, 53 Harv. L. Rev. 1253, 1269 (1940).

[17] The States are Arkansas, Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (a)(3), (4), and (5) (Supp. 1985); Indiana, Ind. Code Ann. § 6-6-8-6 (Burns Supp. 1986); Kentucky, Ky. Rev. Stat. § 138.660(4)-(7) (Supp. 1986); Maryland, Md. Transp. Code Ann. § 13-423(a) (1984); New Jersey, N. J. Stat. Ann. § 54.39 A-10 (West 1986); and Vermont, Vt. Stat. Ann., Tit. 23, §§ 415, 3007, 3010 (1978 and Supp. 1986-1987).

[18] The States are Florida, Fla. Stat. § 207.004(5)(d) (1986); Georgia, Ga. Code. Ann. § 40-2-111 (1985); Maine, Me. Rev. Stat. Ann., Tit. 29, § 2243 (Supp. 1986-1987); Nebraska, Neb. Rev. Stat. § 60-305.03 (1984); New Jersey, N. J. Stat. Ann. § 39:3-6 (West 1973); Oklahoma, Okla. Stat., Tit. 47, § 1120 (Supp. 1986); and Vermont, Vt. Stat. Ann., Tit. 23, § 417 (Supp. 1986-1987).

[19] The parties stipulated that if all the States in which appellant Old Dominion Freight Lines, Inc. operated were to impose a $25 marker fee, the cost of qualifying its vehicles in every State in which it operates its vehicles would amount to a figure that is many times larger than the company's net pretax income in fiscal year 1981. App. 27-28.

[20] Flat-rate license taxes, "if adopted by many cities and states, bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical (and in particular, with the same total quantity of sales) that sells in only one place." Regan, The Supreme Court and

In practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory.[21] Under our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause. *Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue, ante,* p. 232; *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984); *Armco Inc.* v. *Hardesty*, 467 U. S. 638 (1984); *Westinghouse Electric Corp.* v. *Tully*, 466 U. S. 388 (1984); *Maryland* v. *Louisiana*, 451 U. S. 725 (1981); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977). Nor is the axle tax saved because some out-of-state carriers which accrue high mileage in Pennsylvania pay the axle tax at a lower per-mile rate than some Pennsylvania-based carriers; it makes no difference that the axle tax, on its face, does not exact a lower per-mile charge from Pennsylvania-based carriers than from out-of-state carriers. Like the exemption from wholesaling tax for goods manufactured in Washington that we struck down in *Tyler Pipe Industries, Inc.*, the axle tax has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather

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State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1188 (1986).

[21] "It is true also that a State may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways. . . . But no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." *Sprout* v. *South Bend*, 277 U. S. 163, 170 (1928).

than "among the several States." U. S. Const., Art. I, §8, cl. 3.

IV

Notwithstanding our recent precedents invalidating various state taxation measures that failed the "internal consistency" test, Pennsylvania advances three arguments in defense of its flat taxes. They are said to reflect a reasonable charge for the privilege of using its roads when considered alongside the high price that Pennsylvania-based trucks pay in registration fees. Appellees also argue that the flat taxes are no different from the flat user fees this Court has recently upheld. Finally, talismanically invoking decisions in which we upheld flat taxes for the privilege of doing business within a State, appellees contend that a mere disparity in per-mile costs between interstate and intrastate truckers provides no basis upon which to strike down a tax. We are persuaded, however, that none of the cases relied upon by appellees controls our disposition.

The "Rational Restructuring" Defense

Appellees expressly acknowledge that the axle tax cannot be defended as a compensatory tax that equalizes previously unequal tax burdens by offsetting "a specific tax imposed only on intrastate commerce for a substantially equivalent event." Brief for Appellees 18. See *Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, *ante*, at 242–244; *Armco Inc.* v. *Hardesty*, 467 U. S., at 642–643; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 584 (1937). Instead, they argue that the axle tax does not discriminate against interstate commerce because "it is but a small part of Pennsylvania's multi-tiered scheme of taxes and fees designed to finance an extensive highway system." Brief for Appellees 17. Appellees contend that domestic trucks pay a higher price to use Pennsylvania's highways than those registered in other States, and specifically, that the totality of the tax and fee changes since 1980 has resulted in higher relative taxes on trucks registered in Pennsylvania. The registration fee reductions in 1982 only partially offset these increases. We find this argument unavailing.

Appellees' reasoning is based on the erroneous premise that relief for Pennsylvania-based trucks is constitutionally permissible because they are subject to a higher financial burden for their use of Pennsylvania's roads than trucks based in other States must pay for use of the same roads. This premise is flawed for three reasons. Pennsylvania-based trucks are allowed to travel throughout the United States without paying more than one registration fee; the registration fees they pay are not solely for the use of Pennsylvania's highways. In addition, while it is true that registration fees are lower in some States, they are also higher in some other States. See, *e. g.*, App. 178. Most importantly, even if the relative amounts of the States' registration fees confer a competitive advantage on trucks based in other States, the Commerce Clause does not permit compensatory measures for the disparities that result from each State's choice of tax levels. To the extent that a competitive disadvantage is conferred on Pennsylvania carriers by the relative amounts of the States' registration fees, the remedy lies in a change in their level, the enlargement of participation in the IRP,[22] or the collection of revenues through valid taxes. The axle tax cannot be vindicated as a "rational restructuring of burdens" simply because it arguably benefits a class of truckers that pays more to use the State's highways than does another class of highway users. As one commentator has observed, "[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens." J. Hellerstein, 1 State Taxation: Corporate Income and Franchise Taxes ¶4.12[5], p. 150 (1983). The flat taxes must stand or fall on their own.

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[22] The flat taxes would appear to create a disincentive to participation in the IRP because the statute is unclear as to whether trucks based in IRP States are required to pay not only their share of Pennsylvania's registration fees, but the $25 marker fee and the axle tax as well. See 75 Pa. Cons. Stat. §§ 2102(b), (d)(1) (1984) ("The fee for issuance of an identification marker prior to and including March 31, 1983 shall be $25 and thereafter the fee shall be $5. . . . The Secretary of Revenue may by regulation exempt from the requirement to display the identification marker motor carrier vehicles which in his opinion are clearly identifiable such that effective enforcement of this chapter will not suffer thereby"); § 9902 ("all motor carriers shall pay an annual tax in the amount of $36 per axle").

The User-Fee Defense

Taken on their own, the marker fee and axle tax are wholly unlike the user fees we upheld in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972), a case relied upon by the Pennsylvania Supreme Court. *Evansville-Vanderburgh* involved the question whether a municipal airport authority could collect a flat service fee of $1 for each passenger boarding a commercial aircraft operating from the airport.[23] After reviewing our decisions concerning highway tolls, as well as the cases holding that a State may impose a flat fee for the privilege of using its roads without regard to the actual use by particular vehicles, so long as the fee is not excessive, we stated:

> "At least so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *Capitol Greyhound* [*Lines* v. *Brice*, 339 U. S. 542 (1950)], and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more

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[23] In response Congress prohibited any "tax, fee, head charge, or other charge" on air travel. 49 U. S. C. App. § 1513(a). If Congress should disagree with this decision, it would, of course, have the power to authorize flat taxes of this kind. See *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 434 (1946).

> exactly the relative use of the state facilities by individual users." *Id.*, at 716–717.

We then explained why the $1 fee satisfied the two essential conditions that it be neither discriminatory nor excessive:

> "The Indiana and New Hampshire charges meet those standards. *First*, neither fee discriminates against interstate commerce and travel. While the vast majority of passengers who board flights at the airports involved are traveling interstate, both interstate and intrastate flights are subject to the same charges. Furthermore, there is no showing of any inherent difference between these two classes of flights, such that the application of the same fee to both would amount to discrimination against one or the other. See *Nippert* v. *Richmond*, 327 U. S. 416 (1946).
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> "*Second*, these charges reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." *Id.*, at 717.

Pennsylvania's flat taxes satisfy neither of these conditions: They discriminate against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State, and they do not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads.

The Pennsylvania Supreme Court also relied on *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981). The State of Montana imposed a severance tax on coal at the same rate whether the final destination of the coal was local or interstate. We rejected the taxpayer's discrimination claim, which was premised on the fact that 90% of Montana coal was shipped to other States under contracts that shifted the tax burden principally to utility companies outside of Montana and that therefore imposed the bulk of the tax burden on out-of-state consumers of Montana coal. We held that "there is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers." *Id.*, at 619. Because the tax was a percentage of the value of the contract, and because only Montana could impose the tax, every holder of an equivalently valued contract paid the same tax; whether the shipment crossed a state border was irrelevant to the magnitude of the tax burden imposed by Montana. The flat taxes in this case are distinguishable in two ways. First, the amount of Pennsylvania's marker and axle taxes owed by a trucker does not vary directly with miles traveled or with some other proxy for value obtained from the State. "[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." *Id.*, at 629. As Justice Frankfurter argued in his dissent in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 557 (1950):

> "So long as a State bases its tax on a relevant measure of actual road use, obviously both interstate and intrastate carriers pay according to the facilities in fact provided by the State. But a tax levied for the privilege of using roads, and not their actual use, may, in the normal course of operations and not as a fanciful hypothesis, involve an undue burden on interstate carriers. While the privilege extended by a State is unlimited in form, and thus theoretically the same for all vehicles, whether interstate or intrastate, the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, *i. e.*, because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier."

Second, unlike the Montana coal tax, highway use taxes can be imposed by other States.

> "And because it operates in other States there is danger—and not a fanciful danger—that the interstate carrier will be subject to the privilege taxes of several States, even though his entire use of the highways is not significantly greater than that of intrastate operators who are subject to only one privilege tax." *Ibid.* (footnote omitted).

Justice Frankfurter thus illuminated the reason that a State's imposition of an unapportioned flat tax, unlike the neutral user fee in *Evansville-Vanderburgh* and the neutral severance tax in *Commonwealth Edison Co.*, discriminates against interstate commerce.

The Flat-Tax Defense

Third, the cases in support of the State's authority to impose flat use taxes, while lending support to appellees' argument, can no longer suffice to uphold flat taxes with the blatantly discriminatory consequences associated with the marker fee and axle tax.

In *Clark* v. *Poor*, 274 U. S. 554 (1927), the Court held that users of a State's highways, "although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. . . . There is no suggestion that the tax discriminates against interstate commerce." *Id.*, at 557. A few years later in *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U. S. 285 (1935), the Court sustained an annual license fee of $25 imposed on both out-of-state and domestic vehicles, concluding that the case was so similar to *Clark* v. *Poor*, *supra*, "as to apply a closure to debate." 295 U. S., at 289. Unlike the *Clark* case, however, the Court considered and rejected an argument that it was unfair to impose the same charge upon an interstate carrier as upon a local carrier that used the roads more. The Court reasoned that the fee covered the same privilege for both carriers:

> "The appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. The fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. Cf. *Clark* v. *Poor, supra; Hicklin* v. *Coney*, [290 U. S. 169 (1933)]. One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." 295 U. S., at 289.

In a second case brought by the same interstate carrier, the Court again relied on the principle of *Clark* v. *Poor* to support the proposition that "a state, consistently with the commerce clause, may lay upon motor vehicles engaged exclusively in interstate commerce, or upon those who own and so operate them, a fair and reasonable nondiscriminatory tax as compensation for the use of its highways." *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S., at 503. *Aero Mayflower* held that two flat taxes imposed by Montana on each commercial vehicle operated on its highways did not discriminate against interstate commerce; "[b]oth levies apply exclusively to operations wholly within the state or the proceeds of such operations, although those operations are interstate in character. " *Id.*, at 502. The Court was careful to identify the consideration for the taxes as the privilege of using the State's highways,[24] and to point out that the appellant had erred by failing to distinguish between a tax on that privilege and a tax on the privilege of engaging in interstate commerce:

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[24] "The present taxes on their face are exacted 'in consideration of the use of the highways of this state,' that is, they are laid for the privilege of using those highways." 332 U. S., at 503.

> "Appellant therefore confuses a tax 'assessed for a proper purpose and . . . not objectionable in amount,' *Clark* v. *Poor, supra*, at 557, that is, a tax affirmatively laid for the privilege of using the state's highways, with a tax not imposed on that privilege but upon some other such as the privilege of doing the interstate business. Though necessarily related, in view of the nature of interstate motor traffic, the two privileges are not identical, and it is useless to confuse them . . . ." *Id.*, at 504.

Later in the opinion, the Court again emphasized the fact that the gross revenue fee was exacted in consideration for the privilege of using the State's highways, not for the privilege of doing interstate business. *Id.*, at 506.

The distinction between a tax on the privilege of using a State's highways and a tax on the privilege of engaging in interstate commerce was also dispositive in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), decided just four years later. Again addressing a tax on an interstate motor carrier, the Court this time invalidated it, distinguishing *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs* because the *Spector* tax was "not levied as compensation for the use of highways," 340 U. S., at 607, and was not a tax on sales or use. "It is a 'tax or excise' placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State." We explained:

> "Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so. *Freeman* v. *Hewit*, 329 U. S. 249 [1946]; *McLeod* v. *Dilworth Co.*, 322 U. S. 327 [1944]." *Id.*, at 608.

In our more recent decisions we have rejected this somewhat metaphysical approach to the Commerce Clause that focused primarily on the character of the privilege rather than the practical consequences of the tax.[25] In 1977, while we recognized that we had invalidated privilege taxes on in-state activity deemed to be part of interstate commerce, we also noted that we had "moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology." *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S., at 281. "These decisions have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.*, at 279. In *Complete Auto Transit, Inc.*, we not only observed that the *Spector* rule against a tax on the privilege of interstate commerce "has no relationship to economic realities," 430 U. S., at 279, and expressly overruled the *Spector* case itself, 430 U. S., at 289, but also concluded that "the philosophy underlying the rule [that interstate commerce is immune from state taxation has] been rejected." *Id.*, at 288. In ruling that the theoretical underpinnings of this rule had been eroded, we necessarily called into question the future vitality of earlier cases that had upheld facially neutral flat taxes against challenges premised on the rule of immunity for interstate commerce. Unsuccessful challenges had then been turned away on the theory that the State was not taxing the conduct of interstate commerce, but instead was taxing a unitary, formally defined privilege that was sometimes part of intrastate commerce and sometimes part of interstate commerce. Now that it has been firmly established that interstate commerce as such has no immunity from state taxation, it is no longer appropriate to uphold a flat tax merely because the particular formula by which its charges are reckoned extends the same nominal privilege to interstate commerce that it extends to in-state activities. Such formalism "merely obscures the question whether the tax produces a forbidden effect." *Ibid.*

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[25] Compare, *e. g.*, *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183 (1931) (invalidating state tax on exclusively interstate motor carriers' carrying capacity as a tax on privilege of engaging in interstate commerce), with *Hicklin* v. *Coney*, 290 U. S. 169 (1933) (upholding state tax on carrying capacity of interstate carriers which earmarked proceeds for highway maintenance as highway use tax).

Thus, the precedents upholding flat taxes can no longer support the broad proposition, advanced by appellees, that every flat tax for the privilege of using a State's highways must be upheld even if it has a clearly discriminatory effect on commerce by reason of that commerce's interstate character. Although out-of-state carriers obtain a privilege to use Pennsylvania's highways that is nominally equivalent to that which local carriers receive, imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause. The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral "guise of taxation which produces the excluding or discriminatory effect." *Nippert* v. *Richmond*, 327 U. S. 416, 426 (1946). Those precedents are still valid, however, in their recognition that the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens.[26]

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[26] In *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495 (1947), after disposing of the appellant's main claims, the Court in a footnote summarily rejected appellant's alternative claim that the minimum fee of $15 on gross receipts was unreasonable because it imposed a tax roughly 10 times greater than would be required if the percentage standard set forth in the statute (0.5% of gross operating revenues) were used. We observed that the "Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use. In return for the $15 fee appellant can do business grossing $3,000 per vehicle annually for operations on Mon-

The administrative machinery of revenue collection for highways is now obviously capable of taking into account at least the gross variations in cost per unit of highway usage between Pennsylvania-based and out-of-state carriers that are presented by these facts. Pennsylvania, as noted, uses mileage figures to apportion motor carriers' registration fees among IRP jurisdictions, to collect fuel taxes from trucks that travel less than 90% of their miles in Pennsylvania, and to calculate axle tax rebates. Pennsylvania also apportions the corporate income tax it imposes on interstate carriers by the carrier's total miles traveled in the State. Pa. Stat. Ann., Tit. 72, § 7401(3)2(b) (Purdon Supp. 1987).[27] While flat taxes may be perfectly valid when administrative difficulties make collection of more finely calibrated user charges impracticable, we conclude that this justification is unavailable in the case of Pennsylvania's unapportioned marker fee and axle tax.

V

Appellees request that in the event of an adverse decision, the Court remand the case to the Pennsylvania Supreme Court to consider whether our ruling should be applied retroactively and to decide other remedial issues. We agree that having

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tana roads. Appellant was not wronged by its failure to make the full use of the highways permitted." *Id.*, at 506, n. 19. Our disposition was thus based on the costs the State would encounter in collecting taxes for vehicles that earned less than $3,000 annually in Montana. We also emphasized the administrative impossibility of precise apportionment according to road use in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546 (1950). In that case we upheld a 2% tax on the fair market value of motor vehicles for the use of state highways as a rough approximation of use because of the administrative burden of applying a tax formula that would vary "with every factor affecting appropriate compensation for road use."

[27] See also Brief for State of North Carolina et al. as *Amici Curiae* 21 (each of these States, which recoup highway costs through registration fees apportioned to mileage under the IRP and through motor fuel purchase and use taxes directly related to miles traveled within the State, experiences no administrative difficulties).

decided the constitutional issue presented to us, we should remand for further proceedings in the marker fee, axle tax, and marker fee refund suits. See *Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, *ante*, at 251–253.

The judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

In finding Pennsylvania's "flat" highway use taxes unconstitutional under the Commerce Clause, the Court today directly overrules the holdings of at least three cases: *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542 (1950); *Aero Mayflower Transit Corp.* v. *Board of Railroad Comm'rs*, 332 U. S. 495 (1947); and *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U. S. 285 (1935). These cases were apparently cited with approval as recently as *Massachusetts* v. *United States*, 435 U. S. 444, 463–464 (1978), and *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U. S. 707, 715–717 (1972). In *Massachusetts* the opinion states:

> "[W]e turn to consider the Commonwealth's argument that § 4491 should not be treated as a user fee because the amount of the tax is a flat annual fee and hence is not directly related to the degree of use of the airways. This argument has been confronted and rejected in analogous contexts. *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542 (1950) is illustrative. . . . Noting that the tax 'should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted,' *id.*, at 545, the Court rejected the carrier's argument:
>
> "'Complete fairness would require that a state tax formula vary with every factor affecting appropriate com-

> pensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with "rough approximation rather than precision." . . . Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. . . . Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads.' *Id.*, at 546–547. (Citations and footnotes omitted).
>
> "See also *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495 (1947) . . . ." *Massachusetts* v. *United States*, *supra*, at 463–464.

I am aware of the substantially contemporaneous criticism of the *Aero Mayflower* line of decisions. See, *e. g.*, *Capitol Greyhound Lines* v. *Brice*, *supra*, at 548–560 (Frankfurter, J., dissenting); Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L. J. 219, 232 (1957); Lockhart, State Tax Barriers to Interstate Trade, 53 Harv. L. Rev. 1253, 1267–1270 (1940). Flat highway use taxes may potentially pose a serious practical burden for interstate commerce. See *ante*, at 284–287. Certainly, as a matter of first impression the constitutionality of flat highway use taxes could have been resolved differently. Nonetheless, this particular issue has been settled now for over 50 years and Congress has not seen fit to pre-empt these taxes by exercising its commerce power, though, of course, it has had recent occasion to consider and reconsider the problems of the trucking industry. See Motor Carrier Act of 1980, 94 Stat. 793 *et seq.*, as amended, 49 U. S. C. § 10101 *et seq.*; see generally Thoms, Rollin' On . . . To a Free Market: Motor

Carrier Regulation 1935–1980, 13 Trans. L. J. 43 (1983). If and when the practical problems that the Court envisions occur, Congress may correct them. Indeed, as the Brief for State of Vermont as *Amicus Curiae* 3–8 sets out in some detail, Congress, the Executive, and the States have, in fact, recently and actively considered the issue. See H. R. 4518, 98th Cong., 1st Sess. (1983); Surface Transportation Issues: Hearings before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 98th Cong., 2d Sess. (1984) (hereinafter 1984 Hearings); Oversight of the Motor Carrier Act of 1980: Hearings before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 98th Cong., 1st Sess. (1983). Federal action has been deferred while the National Governors' Association attempts to develop uniform national standards for taxation of interstate motor carriers. 1984 Hearings 1201–1213; see National Governors' Association Center for Policy Research, An Experiment in Federalism: Can the States Improve the Interstate Motor Carrier Taxation System?, Capital Ideas (Feb. 1, 1986).

In the meantime, the reliance interest sought to be protected by the doctrine of *stare decisis* has grown up around the settled rule. For example, Pennsylvania has collected some $300 million in axle taxes to be spent on highway improvements that, of course, largely benefit the interstate trucking industry. Brief for Appellees 7. In my view, Pennsylvania, in structuring its program for financing highway construction and repair, had every reason to rely upon the settled understanding that flat highway taxes reasonably related to the extent of the benefit conferred do not violate the Commerce Clause. Similarly, Arkansas, appearing as *amicus curiae* here, opened its highways to the heaviest trucks only upon the understanding that it might collect sufficient revenue from those trucks by means of flat taxes to compensate for the damage they do to its roads. See *Ameri-*

can Trucking Assns., Inc. v. *Gray*, 288 Ark. 488, 503–504, 707 S. W. 2d 759, 766–767 (1986), cert. pending, No. 86–358. If this flat tax is also unconstitutional, then Arkansas is left with the damage but without the taxes. Brief for State of Arkansas as *Amicus Curiae* 6 (estimating incremental damage by heavy trucks at $53 million annually). In light of these reliance interests, in my view, if a new rule is to be declared, Congress should do it. *Capitol Greyhound Lines* v. *Brice*, 339 U. S., at 547.

The Court's suggestion, *ante*, at 294–296, that the *Aero Mayflower* line of cases is somehow intimately bound up with the rule of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), and therefore was overruled *sub silentio* along with *Spector* in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), is easily refuted. The fact of the matter is that *Spector* and *Complete Auto Transit* involved a state tax on the privilege of doing business, an entirely different form of state taxation, that *Spector* found that form of taxation *unconstitutional* and therefore had to *distinguish* the *Aero Mayflower* line of decisions, see *Spector Motor Service, Inc.* v. *O'Connor*, *supra*, at 607, and n. 4, and that this Court explicitly relied on the *Aero Mayflower* line *after Complete Auto Transit* in *Massachusetts* v. *United States*, 435 U. S., at 463–464. Similarly, the Court's reliance upon *Nippert* v. *Richmond*, 327 U. S. 416 (1946), is inappropriate. Again a somewhat different form of taxation was involved in *Nippert* and the case *predates* both *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495 (1947), and *Capitol Greyhound Lines* v. *Brice*, *supra*.

Appellants argue that circumstances have so substantially changed since the days of *Aero Mayflower* and its progeny that the cases, even if they had some basis when they were decided, have no basis now. They point to the growth of the interstate trucking industry and the increased reliance on mileage apportioned taxes in our time and argue that presently the extent of the burden on interstate commerce is greater, and the administrative inconvenience associated with apportioned taxes less. These arguments are not without some force. Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate, and we have reconsidered cases in the dormant Commerce Clause area before. See, *e. g.*, *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 614–617 (1981), disapproving statements in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 (1922); *Hughes* v. *Oklahoma*, 441 U. S. 322, 326–336 (1979), overruling *Geer* v. *Connecticut*, 161 U. S. 519 (1896); *Complete Auto Transit, Inc.*, *supra*, at 278–289, overruling *Spector Motor Service, Inc.*, *supra*. But the changes that appellants point to are of degree, not kind. Interstate trucking and mileage-based taxes were certainly not oddities when *Capitol Greyhound Lines* v. *Brice*, *supra*, was decided in 1950. See, *e. g.*, *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245 (1928) (upholding mileage-based tax and noting existence of fuel tax). Indeed, the substantial contemporaneous criticism of the *Aero Mayflower* line of cases makes clear that the potential burden on interstate commerce that flat taxes posed, and the existence of feasible alternatives, were fully understood at the time these cases were decided. In short, I do not believe that the evolutionary changes we have seen in the trucking industry are substantial enough to defeat the strong *stare decisis* concerns, and the resulting reliance interests of the States, present here.

Neither does *Armco Inc.* v. *Hardesty*, 467 U. S. 638 (1984), dictate a different result. The West Virginia taxation scheme in that case on its face discriminated against out-of-state manufacturers: "if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price." *Id.*, at 642. Since this facially discriminatory tax could not be justified under the compensatory tax doctrine, *id.*, at 642–643, it was held unconstitutional. See *Maryland* v. *Louisiana*, 451

U. S. 725, 758–760 (1981). There is nothing in *Armco* to suggest that the *Aero Mayflower* line of cases was being implicitly disapproved or even that these cases were considered at all relevant to the case before the Court. Nor do I read *Armco* as establishing a grandiose version of the "internal consistency test" as the constitutional measure of all state taxes under the Commerce Clause. See *ante*, at 282–284; cf. *Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, *ante*, at 254–259 (SCALIA, J., dissenting). In my view, the fact that the tax in *Armco* was facially discriminatory sufficiently supports holding that tax invalid under the Commerce Clause. At most, *Armco* may be read for the proposition that a tax that is facially discriminatory is unconstitutional if it is not "internally consistent." In no way does it stand for the proposition that *nondiscriminatory* state taxes must also generally be "internally consistent" to pass constitutional muster. Creating an "internal consistency" rule of general application is an entirely novel enterprise that the Court undertakes for the first time in this case. Yet the Court gives no reason why such a rule is necessary or desirable, nor does it discuss the views of the lower courts or commentators. Indeed, the limited scholarly work on general application of the internal consistency test is largely negative. See, *e. g.*, Judson & Duffy, An Opportunity Missed: *Armco, Inc.* v. *Hardesty*, A Retreat From Economic Reality in Analysis of State Taxes, 87 W. Va. L. Rev. 723, 739–740 (1985); Lathrop, *Armco*—A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause, 63 Taxes 551, 557 (1985). I am simply unwilling to follow the Court down this path without some greater understanding of the need, and authority, for doing so. I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with the Court that the "internal consistency" test it adopts requires invalidation of the Pennsylvania axle tax and marker fee—as it would any unapportioned flat tax involving multistate activities. For the reasons given in my dissent in *Tyler Pipe Industries, Inc.* v. *Washington Dept. of Revenue*, *ante*, p. 254, I do not believe that test can be derived from the Constitution or is compelled by our past decisions. The same tax is imposed on in-state as on out-of-state trucks; that is all I would require. See *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542 (1950); *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495 (1947); *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U. S. 285 (1935).

The Court's disposition relieves it of the need to address appellants' narrower contention that the axle tax is facially discriminatory because the same law that introduced it reduced registration fees for Pennsylvania-based trucks by, for all practical purposes, precisely the amount of the axle taxes. I would reject that challenge as well. The axle tax is imposed uniformly on both in-state and out-of-state vehicles, and is therefore not facially discriminatory. The registration fee is imposed only on in-state trucks, and its reduction likewise does not facially discriminate against interstate commerce. Since both the axle tax and the reduction in registration fees are independently nondiscriminatory, I would sustain them.

Appellants rely on *Maryland* v. *Louisiana*, 451 U. S. 725 (1981), in which we invalidated Louisiana's use tax on offshore gas because the State credited payments of that tax against other taxes imposed on local commerce, such as the severance tax on in-state production, and exempted gas used for certain in-state activities from the tax. *Id.*, at 732-733, 756. That case is readily distinguishable. Pennsylvania provides no exemption from its axle tax for in-state truckers, and does not permit axle tax payments to be used as credits against the registration fee. The axle tax *alone*—unlike the gas tax in *Maryland* v. *Louisiana*—is on its face nondiscriminatory.

It may well be that the lowering of the exclusively intrastate registration fee has the same net effect as would a tax credit for the axle tax. But so would have the establishment of the registration fee and the axle tax at their current levels in the first place. To determine the facially discriminatory character of a tax not on the basis of the tax alone, but on the basis of the structure of a State's tax code, is to extend our case law into a new field, and one in which principled distinctions become impossible. What if, for example, the registration fees for Pennsylvania-based barges, rather than trucks, had been reduced in an amount that precisely compensated for the additional revenues to be derived from the increased axle fees? Or what if Pennsylvania had enacted the axle tax without reducing registration fees, and then one year later made a corresponding reduction in truck registration fees? This case, of course, is more difficult than those examples, because the tax reduction and axle tax both apply to the same mode of transport and were enacted simultaneously. However, to inquire whether a tax reduction is close enough in time or in mode to another tax so that "in effect" the latter should be treated as facially discriminatory is to ask a question that has no answer.

Legislative action adjusting taxes on interstate and intrastate activities spans a spectrum, ranging from the obviously discriminatory to the manipulative to the ambiguous to the wholly innocent. Courts can avoid arbitrariness in their review only by policing the entire spectrum (which is impossible), by policing none of it, or by adopting rules which subject to scrutiny certain well-defined classes of actions thought likely to come at or near the discriminatory end of the spectrum. We have traditionally followed the last course, confining our disapproval to forms of tax that seem clearly designed to discriminate,* and accepting the fact that some amount of discrimination may slip through our net. A credit against intrastate taxes falls readily within the highly suspect category; a reduction of intrastate taxes to take account of increased revenue from a nondiscriminatory axle tax does not.

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*There is one area where we seem to have based our decisions less on the form of the tax than on the character of the activity taxed: the "drumming" cases, where we have invalidated, without elaborate inquiry, facially

I acknowledge that the distinction between a credit and a straight reduction is a purely formal one, but it seems to me less absurd than what we will be driven to if we abandon it. The axle tax and registration fee reduction in this case appeared in the same bill. Extend the rule to treat that as "in effect" a tax credit, and the next case will involve two different bills enacted the same day, or a week apart, or at the beginning and end of the same session. A line must be drawn somewhere, and (in the absence of direction from any authoritative text) I would draw it here.

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neutral taxes on soliciting activities. See, *e. g., Nippert* v. *Richmond*, 327 U. S. 416 (1946). "Everybody knows" that these laws have but a single purpose, to protect local merchants from out-of-town (and hence out-of-state) competition. The temptation was great to presume that whole class of taxes, regardless of their nondiscriminatory form, guilty until proved innocent. I do not think those cases are an attractive model on which to base a more general Commerce Clause jurisprudence.

CALIFORNIA *v.* ROONEY

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 85-1835. Argued March 25, 1987—Decided June 23, 1987

A warrant to search a particular apartment in a multi-unit building was issued on the basis of a police officer's affidavit declaring, *inter alia*, that through a search of the communal trash bin in the building's basement the police had retrieved a bag containing evidence indicating that respondent was conducting an illegal bookmaking operation in the apartment. After the search of the apartment yielded incriminating evidence, respondent was arrested and charged with a number of felonies. Subsequently, a Magistrate granted respondent's motion to quash the warrant, ruling that the use of the evidence obtained from the warrantless search of the trash bin to support the search warrant for the apartment violated respondent's Fourth Amendment rights, and that the other supporting evidence was insufficient to establish probable cause. The California Superior Court agreed and dismissed the charges. However, the State Court of Appeal reversed, concluding that, although the evidence found in the trash bin could not be used to support the warrant, there was sufficient other evidence to establish probable cause. After the State Supreme Court denied both petitioner's and respondent's petitions for review, the State sought review in this Court, arguing that the California courts had erred in stating that the search of the trash was unconstitutional.

Held: The writ of certiorari previously granted by this Court is dismissed as improvidently granted, since the Court's review of the question on which the writ was granted—whether respondent retained an expectation of privacy in the bag that he placed in the communal trash bin—would be premature in that that issue has never been the subject of an actual state-court judgment and is not properly presented in this case. This Court reviews judgments, not statements in opinions. Here, since the search warrant which was the sole focus of the litigation was deemed valid, the judgment of the Court of Appeal was entirely in the State's favor, and the fact that that court fortuitously addressed the trash bin issue in a way that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review. If the case comes to trial and the State is barred from introducing the trash bin evidence because the Court of Appeal's decision constitutes the law of the case, the State will still have the opportunity to appeal that order, and this Court will then have the chance to review a state-court *judgment* on which the State Supreme Court has passed or declined review in a case that properly raises the issue.

Certiorari dismissed. Reported below: 175 Cal. App. 3d 634, 221 Cal. Rptr. 49.

Arnold T. Guminski argued the cause for petitioner. With him on the briefs were *Harry B. Sondheim* and *Ira Reiner*.

Arthur Lewis argued the cause for respondent. With him on the brief was *Roger S. Hanson*.*

PER CURIAM.

We granted the State's petition for certiorari to decide whether respondent retained an expectation of privacy in a bag that he placed in the communal trash bin of a multi-unit apartment building. After briefing and oral argument on that issue, it has now become clear that the question is not properly presented in this case.

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, *Thomas A. Brady*, Supervising Deputy Attorney General, *Laurence K. Sullivan*, Assistant Supervising Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Charles A. Graddick* of Alabama, *Jim Smith* of Florida, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *David L. Armstrong* of Kentucky, *Edward Lloyd Pittman* of Mississippi, *Nicholas J. Spaeth* of North Dakota, *LeRoy S. Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *Mary Sue Terry* of Virginia, *Kenneth O. Eikenberry* of Washington, *Bronson La Follette* of Wisconsin, and *A. G. McClintock* of Wyoming; and for Americans for Effective Law Enforcement, Inc., et al. by *David Crump*, *Courtney A. Evans*, *Daniel B. Hales*, *Jack E. Yelverton*, *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak*.

John Hamilton Scott filed a brief for the California Public Defender's Association as *amicus curiae* urging affirmance.

I

Based upon an informant's tip that respondent was accepting wagers on professional football games at a specified telephone number, police began an investigation which eventually led to an application for a search warrant for 1120 North Flores Street, Apartment No. 8, West Hollywood, California. In conjunction with the application, a police officer submitted an affidavit including at least five details in support of the warrant: (1) that the informant had named Rooney and had correctly specified when Rooney would be at the apartment; (2) that the telephone number and utilities were listed to one Peter Ryan, and that use of a pseudonym is common among bookmakers; (3) that Rooney had previously been arrested for bookmaking at the apartment; (4) that through a search of the communal trash bin in the apartment building's basement the police had retrieved a bag containing mail addressed to Rooney at Apartment No. 8, and containing evidence of gambling activity; and (5) that the police had dialed the telephone number the informant had given them and had overheard a conversation involving point spreads on professional football games. See App. 19–28. The Magistrate found probable cause for a search of Apartment No. 8, and issued a warrant. Incriminating evidence was found during the search, and respondent was arrested.

After he was charged with a number of felony offenses, respondent brought a motion to quash the search warrant and to dismiss the felony charges against him. He argued that there was no probable cause to support the warrant because the earlier warrantless search of the communal trash bin had violated his Fourth Amendment rights under a number of California Supreme Court precedents, and that, without the incriminating evidence found in the trash, there was insufficient evidence to support the warrant. A Magistrate granted respondent's motion, agreeing that the evidence obtained from the trash bin could not be used to support the search warrant for the apartment, and ruling that the other evidence offered in support of the search warrant was insufficient to establish probable cause. The Superior Court reached the same conclusion. Pursuant to California procedural rules, the State then informed the court that it could not prosecute the case without the evidence seized in the search of the apartment, and the case was dismissed, thus allowing the State to appeal the order quashing the warrant.

The Court of Appeal reversed on the only issue before it—to use the State's words, "the sufficiency of the affidavit in support of the search warrant."[1] 175 Cal. App. 3d 634, 221 Cal. Rptr. 49 (1985). Although it concluded that the evidence found in the trash bin could not be used to support the search warrant, the Court of Appeal examined the other evidence offered in support of the warrant under the standards set forth in *Illinois* v. *Gates*, 462 U. S. 213 (1983), and held that there was sufficient other evidence to establish probable cause in support of the warrant. The Superior Court's order dismissing the case was therefore reversed, allowing the prosecution to proceed. The California Supreme Court denied both petitioner's and respondent's petitions for review. The State then sought review in this Court, arguing that the California courts had erred in stating that the search of the trash was unconstitutional. We granted certiorari. 479 U. S. 881 (1986).

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[1] Opening Brief for Appellant in No. B006936, Cal. 2d App. Dist.

Throughout the proceedings it was clear that the courts were passing only upon Rooney's motion to quash the search warrant and suppress the evidence found in the apartment; there was no motion to suppress the evidence found in the trash. For example, the first thing the Magistrate said after calling Rooney's case was: "This is before the Court on the notice of motion to quash the search warrant pursuant to Penal Code Section 1538.5." Clerk's Transcript 2–3. After hearing argument involving the different parts of the affidavit supporting the search warrant, the Magistrate announced: "It is going to be the ruling of this Court that although this is a relatively close matter, but I feel that the notice of motion to quash the search warrant pursuant to Penal Code Section 1538.5 should be granted." *Id.*, at 21.

Again, when the case came before the Superior Court, the first thing the judge stated was: "The matter pending, motion to suppress evidence pursuant to Section 1538.5. At this point, to classify the issue, is directed at the sufficiency of the affidavit in support of the search warrant and challenges that affidavit on its face." App. 50.

II

This Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297 (1956); see also *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984); *Williams* v. *Norris*, 12 Wheat. 117, 120 (1827). Here, the judgment of the Court of Appeal was entirely in the State's favor—the search warrant which was the sole focus of the litigation was deemed valid. The fact that the Court of Appeal reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision, or for the prevailing party to request us to review it. That the Court of Appeal even addressed the trash bin issue is mere fortuity; it could as easily have held that since there was sufficient evidence to support the search even without the trash evidence, it would not discuss the constitutionality of the trash search. The Court of Appeal's use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review.[2]

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[2] A careful and adequate reading of the record, cf. *post*, at 318 (WHITE, J., dissenting), reveals that the State itself has never believed that the Court of Appeal's judgment incorporated any motion to suppress the evidence found in the trash. For example, as JUSTICE WHITE notes, the State sought rehearing in the Court of Appeal, but as part of that petition it stated that the Court of Appeal's "opinion should be appropriately modified to delete its discussion of the issue since its determination that the search warrant was based upon probable cause was made notwithstanding its conclusion that the *Krivda* rule [*People* v. *Krivda*, 5 Cal. 3d 357, 486 P. 2d 1262 (1971)] applies to communal trash bins." Petition for Rehearing or Modification of Opinion in No. B006936 (Cal. 2d App. Dist.), p. 4. If the

But, the State argues, *if* the case does come to trial, and *if* the State does wish to introduce the evidence, it will be barred from doing so because the reasoning in the Court of Appeal's decision will constitute the law of the case. There

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Court of Appeal had actually issued a judgment on the issue, the State would have sought a modification of the *judgment*—not a mere modification of the *opinion*. That the State does not believe that the Court of Appeal issued a judgment excluding the evidence from the trash search is further corroborated by the State's own arguments before this Court. In its petition for certiorari, the State explained:

"At first blush, it might be urged that a petition for writ of certiorari should not be granted because the Court of Appeal's conclusion that the search of the apartment building communal trash bin was unreasonable constitutes *obiter dicta*. However, the Court of Appeal's determination that the search of the trash bin was unreasonable cannot be deemed to merely constitute *obiter dicta*. . . . *Unless overturned on this point, the Court of Appeal's conclusion constitutes the law of the case*. . . . Hence at the trial, the People *would be* precluded from introducing evidence as to what the police officers had found in the trash bin." Pet. for Cert. 14–15 (emphasis added, citations omitted).

Similarly, the Deputy District Attorney arguing the case before this Court candidly described the State's reasons for seeking certiorari in this case:

"Q. So that everything you found under the search warrant is admissible.

"Mr. Guminski: That is correct, Your Honor. But the ruling . . . is a ruling that forecloses the use of what was discovered as far as the trash bag; that would be the rule of the case.

"Q. And you think you're really going to use that at this trial, or you think that you would really need to?

"A. Well, Your Honor, I think what we really want would be to . . . overrule *People* v. *Krivda*, which was here before this Court in 1972, and which was remanded then because there were independent state grounds.

"I mean, I wish to answer candidly to your question, Justice; there is an intention to use it, of course.

"But it is a vehicle of review." Tr. of Oral Arg. 26–27.

Of course, as we explain, see text this page and *infra*, at 313–314, the law-of-the-case doctrine provides no justification for our granting review at this stage. See *Barclay* v. *Florida*, 463 U. S. 939, 946 (1983); *Hathorn* v. *Lovorn*, 457 U. S. 255, 261–262 (1982); see generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 132 (6th ed. 1986).

are two too many "ifs" in that proposition to make our review appropriate at this stage. Even if everything the prosecution fears comes to bear, the State will still have the opportunity to appeal such an order,[3] and this Court will have the chance to review it, with the knowledge that we are reviewing a state-court *judgment* on the issue, and that the State Supreme Court has passed upon or declined review in a case squarely presenting the issue. As it stands, we have no way of knowing what the California Supreme Court's position on the issue of trash searches currently is.[4] It is no answer to

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[3] Assuming that respondent's motion to suppress the trash evidence will be granted, the prosecution will then have to decide whether it can prosecute without the evidence. If it cannot, then an order of dismissal will be entered, and the prosecution may immediately appeal. See Cal. Penal Code Ann. §§ 1238, 1538.5 (West 1982). Even if the prosecution can proceed without the evidence, however, it may still obtain immediate review through a writ of mandate or prohibition. § 1538.5(o). A writ of mandate could compel the Superior Court to admit the evidence and "must be issued where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." Cal. Civ. Proc. Code Ann. § 1086 (West 1982). See generally B. Witkin, California Criminal Procedure §§ 869, 870 (1985 Supp., pt. 2).

[4] The California rule regarding trash searches is derived from the California Supreme Court's decision in *People* v. *Krivda*, 5 Cal. 3d 357, 486 P. 2d 1262 (1971) (en banc). We granted certiorari to review that decision but we were unable to determine whether the California Supreme Court had rested its decision on state or federal grounds. 409 U. S. 33 (1972). On remand, the court announced that it had rested on both state and federal constitutional grounds, 8 Cal. 3d 623, 504 P. 2d 457, cert. denied, 412 U. S. 919 (1973), which prevented us from reviewing the case. In 1985, however, the people of California amended their Constitution to bar the suppression of evidence seized in violation of the California, but not the Federal, Constitution. Cal. Const., Art. I, § 28(d); see generally *In re Lance W.*, 37 Cal. 3d 873, 694 P. 2d 744 (1985). Thus, the Court of Appeal was forced to rest its discussion of the trash-search issue in this case on the Federal Constitution.

While we express no view on the merits of the issue, we note that the arguments that the State now makes rely, in large part, on post-*Krivda* developments, including the state constitutional amendment discussed above, this Court's intervening decisions, and decisions of the United say that the California Supreme Court already had its chance to review the matter and declined to do so when it denied the State's petition for review in this case. The denial of review may well have been based on that court's recognizing, as we now do, that the prosecution won below, and was therefore not in a position to appeal. Giving the California Supreme Court an opportunity to consider the issue in a case that properly raises it is a compelling reason for us to dismiss this petition.[5] Under these circumstances, our review of the trash-search issue, which has never been the subject of an actual judgment, would be most premature.

The writ of certiorari is dismissed as improvidently granted.

JUSTICE MARSHALL concurs in the judgment.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

The police obtained information that respondent, using a specified telephone number, was accepting wagers on professional football games. It was learned from the telephone company that the telephone number was listed to one Peter Ryan at 1120 North Flores Street, Apartment No. 8, West Hollywood, California. Two officers went to 1120 North Flores Street, a 28-unit apartment building with a subterranean garage which was accessible to the public, entered the garage, and searched the communal trash bin. In the bottom half of the bin they discovered a brown paper shopping bag which contained mail addressed to respondent at 1120

States Courts of Appeals dealing with trash searches. The California Supreme Court should be afforded the opportunity to consider these factors before we intervene.

[5] Moreover, because of the unusual posture of the case, we cannot know whether the prosecution will even seek to introduce the trash evidence at trial. If the evidence found in the apartment pursuant to the valid warrant is strong enough, the prosecution might not even be interested in presenting the more attenuated evidence found in the trash.

North Flores Street, Apartment No. 8, and papers bearing bookmaking notations. The police seized the bag. They used these items and the results of further investigation to support a search warrant of respondent's apartment, which was duly executed.

Rooney was charged with bookmaking and associated crimes. He moved to have the warrant quashed and the evidence obtained from the search of the trash bin excluded. The trial court granted his motion, the State declared that it could not proceed, and the case was dismissed. The State's appeal followed. The California Court of Appeal held that the State had failed to prove that Rooney had abandoned his property by putting it into the trash bin. Because the garage was accessible to the public, however, and the officers did not commit a trespass by entering the garage, the court also rejected Rooney's claim that the search of the bin was illegal because it occurred within the curtilage of his apartment. In so ruling, the Court of Appeal relied on a holding of the California Supreme Court to this effect. *People* v. *Terry*, 61 Cal. 2d 137, 152, 390 P. 2d 381, 391 (1964). The court went on to hold that under the decisions of the Supreme Court of California, the Fourth Amendment did not require a warrant for a trash-bin search but did require probable cause, which the court found lacking here.[1] The search of the trash bin therefore violated the Fourth Amendment and the evidence seized from the bin was not admissible. The subsequent warrant, however, was itself valid, since it was supported by probable cause wholly aside from the trash-bin evidence. It is the former holding that the State challenged in its petition for certiorari after the California Supreme Court denied review. I would reverse.

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[1] The court observed that the "Truth in Evidence" provision of the Victim's Bill of Rights (Proposition 8) abrogated a defendant's right to object to and to suppress evidence seized in violation of the California but not of the Federal Constitution. 175 Cal. App. 3d 634, 644, 221 Cal. Rptr. 49, 55 (1985). The Court of Appeal noted, however, that the California Supreme Court had held that under both the California and Federal Constitutions, a trash can outside the curtilage of a house could be searched without a warrant, but not without probable cause. *People* v. *Krivda*, 5 Cal. 3d 357, 486 P. 2d 1262 (1971), vacated and remanded, 409 U. S. 33 (1972), on remand, 8 Cal. 3d 623, 504 P. 2d 457, cert. denied, 412 U. S. 919 (1973).

I

We granted certiorari to consider whether the search of the communal trash bin violated the Fourth Amendment. The Court now holds that the issue is not properly before us and dismisses the writ. Because this judgment is plainly infirm, I dissent.

Rooney first moved to quash the search warrant in the Municipal Court on the ground that the evidence taken from the trash bin had been illegally seized and could not be used to furnish probable cause for the warrant. The Magistrate agreed that the trash-bin search was illegal and that aside from the items taken from the bin, the search warrant affidavit failed to reveal probable cause for the issuance of the warrant. The case was dismissed when the State indicated it could not proceed.

The State, claiming that the ruling had been erroneous, moved in the Superior Court to reinstate the charges. The motion was granted and a trial date was set. Rooney then filed a motion "to suppress as evidence all tangible or intangible things seized, including but not limited to observations and conversations." App. 40–41. There were two grounds for the motion: first, that the State had obtained the address of the apartment without a warrant and that this alleged violation tainted the fruits of all subsequent investigations; second, that the search of the trash bin was illegal. *Id.*, at 43–45. Most of the hearing on the motion centered on the search of the trash bin, the court concluding that the items seized from the bin could not be used to furnish probable cause for the warrant. *Id.*, at 69–70. The case was again dismissed on the State's representation that it could not proceed.

The record to this point plainly reveals that the motion to suppress filed in the Superior Court literally covered the items seized from the trash bin. Moreover, quashing the warrant was based on the ruling that the search of the bin was illegal and that the items seized could not be used to support the warrant. It makes no sense to characterize this ruling as anything but a suppression of the items seized: they could not be used as evidence to support the warrant and obviously could not be used as evidence at trial.

The State appealed, arguing that the ruling on the trash bin was erroneous and that the warrant was valid. The Court now suggests that the Court of Appeal had before it only the admissibility at trial of the evidence seized from the apartment pursuant to the warrant. But the warrant could have been sustained either because the trash-bin search was legal and the items seized from the bin therefore admissible or because the other evidence was itself sufficient. The Court of Appeal expressly said that both issues were before it:

> "The People bring this appeal (Pen. Code, § 1238, subd. (a)(7)) from the *order dismissing the case against defendant* who was charged with bookmaking (§ 337a). The dismissal was entered after the prosecution represented that it could not proceed due to the granting of defendant's motion to quash a search warrant *and suppress evidence* (§ 1538.5). *The first issue before us is whether the warrantless search of the defendant's apartment building's trash bin constituted an unreasonable search and seizure.* We conclude that it did for lack of probable cause. The second issue is whether a police officer's affidavit provided probable cause for the issuance of the search warrant authorizing the search of defendant's apartment. We conclude that even excluding the items seized from the trash bin, the tip from the informant

> coupled with other corroborating evidence were sufficient to support the warrant. We therefore reverse and remand." 175 Cal. App. 3d 634, 638–639, 221 Cal. Rptr. 49, 51 (1985) (emphasis added).

The State argued only the legality of the search of the bin, and the Court of Appeal addressed that issue first, devoting most of its opinion to the question, which it surely would not have done if the issue were irrelevant to its disposition of the case. Had the Court of Appeal upheld the trash-bin search, it would have reversed the Superior Court. The Court of Appeal dealt with the adequacy of the other evidence only after holding that the items seized from the bin could not be used as evidence to support the warrant. That ruling effectively made that evidence unavailable to the State.

Both parties filed petitions for rehearing, Rooney arguing that the issue of the adequacy of the evidence aside from the items seized from the bin was not properly before the court and that the issue had been improperly decided. The State reargued the legality of the search of the bin but also asked in any event that the court strike the portion of its opinion dealing with the items seized from the trash, since that ruling foreclosed using that evidence at trial. Both petitions were denied.

Both sides then filed petitions for review in the California Supreme Court, the State arguing that it had erroneously been denied the use at trial of the evidence found in the trash bin. Both petitions for review were denied. The State then sought a stay of the Court of Appeal's judgment pending certiorari here. Its argument was that it was entitled to the stay in order to permit it to seek review of the judgment that the trash-bin items were not admissible at trial. The Court of Appeal granted the stay and we in turn granted certiorari.

There is no jurisdictional obstacle to deciding the issue on which we granted certiorari. The highest court of the State in which review could be had decided that question against the State, clearly holding that the trash-bin evidence must be suppressed. It then stayed the effect of that ruling. We granted certiorari, the case was briefed and orally argued, and Rooney never suggested that the issue of the trash-bin search is not properly before us. We have repeatedly held pretrial orders suppressing evidence to be final judgments within the meaning of 28 U. S. C. § 1257(3). See *New York* v. *Quarles*, 467 U. S. 649, 651, n. 1 (1984); *California* v. *Stewart*, decided with *Miranda* v. *Arizona*, 384 U. S. 436, 498, n. 71 (1966); see also *Michigan* v. *Clifford*, 464 U. S. 287 (1984); *Michigan* v. *Tyler*, 436 U. S. 499 (1978); *Colorado* v. *Bannister*, 449 U. S. 1 (1980).

The Court now dismisses the case, but I suggest that its action is based on a careless and inadequate reading of the record and that it should have more regard for the time and effort that will be wasted by its belated order. Because in my view the legality of the search of the communal trash can is properly here, I shall address it.

II

I note at the outset that I have no reason to differ with the state court that the trash bin was not within the curtilage of Rooney's apartment, that the garage was open to the public, and that the officers committed no trespass and were not invading any private zone when they approached the trash bin. The question is whether the search of the trash bin and the seizure of some of its contents were unreasonable within the meaning of the Fourth Amendment, which protects the right of the people to be secure "in their persons, houses, papers, and effects, against unreasonable searches and seizures."

The State submits that once Rooney placed the seized items in the trash bin, he abandoned them and lost any possessory or ownership interest in them that he may have had. Hence, they were no longer *his* papers or effects and were not protected by the Fourth Amendment.[2] The Court of Appeal rejected this submission and for present purposes, I assume that under state law Rooney retained an ownership or possessory interest in the trash bag and its contents. Rooney's property interest, however, does not settle the matter for Fourth Amendment purposes, for the reach of the Fourth Amendment is not determined by state property law. As we have said, the premise that property interests control the right of officials to search and seize has been discredited. *Oliver* v. *United States*, 466 U. S. 170, 183 (1984); *Katz* v. *United States*, 389 U. S. 347, 353 (1967); *Warden* v. *Hayden*, 387 U. S. 294, 304 (1967). The primary object of the Fourth Amendment is to protect privacy, not property, and the question in this case, as the Court of Appeal recognized, is not whether Rooney had abandoned his interest in the property-law sense, but whether he retained a subjective expectation of privacy in his trash bag that society accepts as objectively reasonable. *O'Connor* v. *Ortega*, 480 U. S. 709, 715 (1987); *California* v. *Ciraolo*, 476 U. S. 207, 211, 212 (1986); *Oliver* v. *United States*, *supra*, at 177; *Smith* v. *Maryland*, 442 U. S. 735, 740 (1979); *Katz* v. *United States*, *supra*, at 361 (Harlan, J., concurring). I therefore proceed to that inquiry.

I acknowledge at the outset that trash can reveal a great deal about the life of its disposer.[3] As respondent eloquently phrases it, the domestic garbage can contains numerous "tell-tale items on the road map of life in the previous week." Brief for Respondent 15. A *hope* of privacy is not equivalent to an *expectation* of privacy, however. Respondent vigorously argues that he exhibited an expectation of privacy by taking the affirmative step of placing his bag of trash in the bottom half of the dumpster. Tr. of Oral Arg. 37–38, 43–44, 55–56. This argument is somewhat difficult to accept. Nothing in the record demonstrates that respondent actually buried his trash in the bin as opposed to simply throwing it in when the bin was nearly empty. In any event, assuming that respondent did have a subjective expectation of privacy, "steps taken to protect privacy [do not] establish that expectations of privacy . . . are legitimate." *Oliver* v. *United States*, 466 U. S., at 182. "Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.*, at 182–183. A person may well intend not to relinquish all rights in personal property but nevertheless take action rendering this intent ineffective for Fourth Amendment purposes.

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[2] The State emphasizes that the Fourth Amendment protects the "right of the people to be secure in *their* persons, houses, papers, and effects." Brief for Petitioner 2. It points to *Oliver* v. *United States*, 466 U. S. 170, 176–177 (1984), as an illustration of the plain language approach to the Fourth Amendment. In *Oliver*, we based our holding that the Fourth Amendment does not extend to an open field on the explicit language of the Amendment. We held that an open field is neither a "house" nor an "effect." See also *id.*, at 184 (WHITE, J., concurring).

[3] The Garbage Project of the University of Arizona, directed by archaeologists at the university, was founded upon the advice of archaeology pioneer Emil Haury: "If you want to know what is really going on in a community, look at its garbage." W. Rathje, Archaeological Ethnography

The State points out that the communal trash bin in which respondent placed his refuse was accessible to other tenants in the apartment building and their guests, to the owner and manager of the building, and to the public at large. It is common knowledge that trash bins and cans are commonly visited by animals, children, and scavengers looking for valuable items, such as recyclable cans and bottles, and serviceable clothing and household furnishings. Accordingly, Cali-

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. . . Because Sometimes It is Better to Give than to Receive, in Explorations in Ethnoarchaeology 49, 54 (R. Gould ed. 1978). In that project, Tucson Sanitation Division personnel randomly selected refuse set out for collection by households throughout the city. Procedures ensured anonymity. The archaeologists sorted the refuse from each household into more than 150 categories in order to improve their understanding of contemporary society (as well as to refine techniques for understanding the material culture of earlier societies).

fornia argues, any expectation of privacy respondent may have had in the contents of the trash bin was unreasonable.

Respondent argues in response that the probability that garbage collectors or the police will search the contents of a particular trash bin is extremely small, and that this minute probability, in and of itself, makes his expectation of privacy in the trash bin reasonable. According to respondent, the reality of domestic garbage collection is that the collectors move quickly from bin to bin, do not have time to look for valuable items, and probably would not recognize evidence of criminal activity. Garbage is promptly intermingled with other garbage in a truck such that its origin can no longer be identified. It is then "hauled to the dump, where it will be burned/destroyed/plowed under by Caterpillar tractors, to form the foundation for new housing developments." Brief for Respondent 16. Similarly, respondent asserts that there clearly are too few policemen in Los Angeles to conduct random searches of trash cans for evidence of crime. Respondent further argues that one may have a "differential expectation of privacy" with respect to animals, children, and scavengers and with respect to the police. *Id.*, at 18; see *Smith* v. *Alaska*, 510 P. 2d 793, 803 (Alaska 1973) (Rabinowitz, C. J., dissenting). While it may not be totally unforeseeable that trash collectors or other third persons may occasionally rummage through one's trash, it may be quite unexpected that the police will conduct a systematic inspection for evidence of criminal activity. In any event, respondent states that the Fourth Amendment protects against the acts of the government, not private citizens.

I am unpersuaded. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz* v. *United States*, *supra*, at 351–352 (citations omitted). Respondent knowingly exposed his betting papers to the public by depositing them in a trash bin which was accessible to the public. Once they were in the bin, he no longer exercised control over them. While he may not have welcomed intrusions, respondent did nothing to ensure that his refuse would not be discovered and appropriated. Indeed, he placed his papers in the bin for the express purpose of conveying them to third parties, the trash collectors, whom he had no reasonable expectation would not cooperate with the police. In *Smith* v. *Maryland*, 442 U. S. 735 (1979), we held that the installation, at the request of the police, of a pen register at the telephone company's offices to record the telephone numbers dialed on the petitioner's telephone did not violate the Fourth Amendment. The petitioner had no legitimate expectation of privacy in the telephone numbers since he voluntarily conveyed them to the telephone company when he used his telephone. "This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.*, at 743–744.

Respondent's reliance on the fact that the police do not ordinarily engage in random searches, or comprehensive citywide searches, of trash cans is misplaced. A police department, like any organization with limited resources, allocates its resources to activities most likely to result in the detection or prevention of crime. The police in this case searched the trash bin after receiving a tip from an informant that a bookmaking operation was being conducted at the apartment house. It is not unforeseeable that police will investigate when they have information suggesting that an investigation will be useful. In *Smith* v. *Maryland*, for example, a Baltimore woman was robbed and thereafter received threatening and obscene phone calls from a man identifying himself as the robber. When their investigation led the police to suspect that the petitioner was the perpetrator, they had the pen register installed and recorded a call from the petitioner's home to the victim. The petitioner would have been entirely justified in believing that the police would not likely have discovered his telephone call to the victim by means of a random search of telephone numbers dialed in the city, and that the police would not likely have undertaken a systematic search of all telephone calls made in the city. That fact, however, did not give petitioner a legitimate expectation of privacy in the telephone numbers he dialed. In *California* v. *Ciraolo*, 476 U. S., at 214, n. 2, we expressly rejected the California Court of Appeal's position that a search, which it would have found permissible if conducted pursuant to a routine police patrol, violated the Fourth Amendment because information of illegality had led the police to focus on a particular place. We held in that case that the observation of a fenced backyard by police officers trained in marijuana identification from a private plane at an altitude of 1,000 feet did not violate the Fourth Amendment because the defendant had no legitimate expectation that his property would not be so observed:

> "The observations of Officers Shutz and Rodriguez in this case took place within public navigable airspace . . . in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from the aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor." *Id.*, at 213–214.

Any distinction between the examination of trash by trash collectors and scavengers on the one hand and the police on the other is untenable. If property is exposed to the general public, it is exposed in equal measure to the police. It is clear from *Ciraolo* that the Fourth Amendment does not require the police to avert their eyes from evidence of criminal activity that any member of the public could have observed, even if a casual observer would not likely have realized that the object indicated criminal activity or would not likely have notified the police even if he or she had realized the object's significance. It may of course be true that a person minds an examination by the police more than an examination by an animal, a child, a neighbor, a scavenger, or a trash collector, but that does not render the intrusion by the police illegitimate.

The Court of Appeal noted the existence of municipal ordinances which prohibit persons other than authorized collectors from rummaging through the trash of another. Such ordinances, however, do not change the fact that the owner of the trash completely relinquishes control over the trash to a third party, the designated trash collector, who, for all the owner knows, will cooperate with the police. Cf. *Lewis* v. *United States*, 385 U. S. 206 (1966); *Hoffa* v. *United States*, 385 U. S. 293 (1966). Moreover, it is not at all clear that such a municipal ordinance would evoke an expectation of privacy in trash. Respondent did not rely on any such ordinance here, and it has been noted that the purpose of such ordinances is sanitation and economic protection of the authorized trash collector rather than privacy. See *United States* v. *Vahalik*, 606 F. 2d 99, 100–101 (CA5 1979), cert. denied, 444 U. S. 1081 (1980); *People* v. *Krivda*, 5 Cal. 3d 357, 368, n. 1, 486 P. 2d 1262, 1264, n. 1 (1971) (Wright, C. J., concurring and dissenting), vacated and remanded, 409 U. S. 33 (1972), on remand, 8 Cal. 3d 623, 504 P. 2d 457, cert. denied, 412 U. S. 919 (1973).

Every Federal Court of Appeals that has addressed the issue has concluded that the Fourth Amendment does not protect trash placed for collection outside a residence and its curtilage. *United States* v. *Dela Espriella*, 781 F. 2d 1432, 1437 (CA9 1986); *United States* v. *O'Bryant*, 775 F. 2d 1528

(CA11 1985); *United States* v. *Michaels*, 726 F. 2d 1307, 1312–1313 (CA8), cert. denied, 469 U. S. 820 (1984); *United States* v. *Kramer*, 711 F. 2d 789 (CA7), cert. denied, 464 U. S. 962 (1983); *United States* v. *Terry*, 702 F. 2d 299, 308–309 (CA2), cert. denied *sub nom. Williams* v. *United States*, 461 U. S. 931 (1983); *United States* v. *Reicherter*, 647 F. 2d 397, 399 (CA3 1981); *United States* v. *Vahalik*, *supra;* *United States* v. *Crowell*, 586 F. 2d 1020, 1025 (CA4 1978), cert. denied, 440 U. S. 959 (1979); *Magda* v. *Benson*, 536 F. 2d 111, 112–113 (CA6 1976); *United States* v. *Mustone*, 469 F. 2d 970, 972 (CA1 1972). The Courts of Appeals had little difficulty reaching this conclusion. As the Third Circuit stated in *United States* v. *Reicherter:*

> "Defendant claims that . . . he had a reasonable expectation of privacy in the trash he placed in a public area to be picked up by trash collectors . . . . A mere recitation of the contention carries with it its own refutation.
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> . . . . .
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> ". . . Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. If he had such an expectation, it was not reasonable." 647 F. 2d, at 399.

This unanimity of opinion among the federal appellate courts supports the determination that society is not prepared to accept as reasonable an expectation of privacy in trash deposited in an area accessible to the public pending collection by a municipal authority or its authorized agent.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL. *v.* AMOS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 86–179. Argued March 31, 1987—Decided June 24, 1987*

Appellee Mayson, who had been employed at a nonprofit facility, open to the public, that was run by religious entities associated with The Church of Jesus Christ of Latter-day Saints (Church), was discharged because he failed to qualify for a certificate that he was a member of the Church and eligible to attend its temples. He, with other individuals purporting to represent a class, brought an action in Federal District Court, alleging religious discrimination in violation of Title VII of the Civil Rights Act of 1964. The defendants moved to dismiss on the ground that they were shielded from liability under § 702 of the Act, which exempts religious organizations from Title VII's prohibition of religious discrimination in employment. The plaintiffs contended that if § 702 was construed to allow religious employers to discriminate on religious grounds in hiring for nonreligious jobs, it violated the Establishment Clause of the First Amendment. Finding that Mayson's case involved nonreligious activities, the court held that, under the test set out in *Lemon* v. *Kurtzman*, 403 U. S. 602, § 702 was unconstitutional as applied to secular activity because it had the primary effect of advancing religion.

Held: Applying § 702's exemption to religious organizations' secular activities does not violate the Establishment Clause. There is ample room under that Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. Section 702's exemption satisfies the first requirement of the three-part *Lemon* test that the challenged law serve a "secular legislative purpose." This requirement is aimed at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. It is a permissible legislative purpose (as here) to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. Section 702 also satisfies *Lemon*'s

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*Together with No. 86–401, *United States* v. *Amos et al.*, also on appeal from the same court.

second requirement that the challenged law have a principal or primary effect that neither advances nor inhibits religion. A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects," the *Government itself* must have advanced religion through its own activities and influence. The District Court's reliance on the facts that § 702 singles out religious entities for a benefit, and is unsupported by long historical tradition, is unpersuasive. Moreover, there is no merit to the contention that § 702 offends equal protection principles by giving less protection to religious employers' employees than to secular employers' employees and thus must be strictly scrutinized. Where, as here, a statute does not discriminate among religions and, instead, is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, the proper inquiry is whether Congress has chosen a rational classification to further a legitimate end. As applied to nonprofit activities of religious employers, § 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions. The third part of the *Lemon* test is also satisfied since § 702 does not impermissibly entangle church and state. Rather, it effects a more complete separation of the two. Pp. 334–340.

Reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and POWELL, STEVENS, and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 340. BLACKMUN, J., *post*, p. 346, and O'CONNOR, J., *post*, p. 346, filed opinions concurring in the judgment.

Rex E. Lee argued the cause for appellants in No. 86–179. With him on the briefs were *Wilford W. Kirton, Jr., Dan S. Bushnell, M. Karlynn Hinman, Benjamin W. Heineman, Jr., Carter G. Phillips*, and *Ronald S. Flagg*. *Assistant Attorney General Reynolds* argued the cause for the United States in No. 86–401. With him on the briefs were *Solicitor General Fried, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Carvin*, and *Andrew J. Pincus*.

David B. Watkiss argued the cause for appellees in both cases. With him on the brief were *Elizabeth T. Dunning, John A. Powell, Joan E. Bertin,* and *John E. Harvey.*†

JUSTICE WHITE delivered the opinion of the Court.

Section 702 of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. § 2000e–1, exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion.[1] The question pre-

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†Briefs of *amici curiae* urging reversal were filed for the American Association of Presidents of Independent Colleges and Universities et al. by *Edward McGlynn Gaffney, Jr.;* for the American Jewish Congress by *Marc D. Stern* and *Amy Adelson;* for the Baptist Joint Committee on Public Affairs by *Donald R. Brewer* and *Oliver S. Thomas;* for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Christian Legal Society et al. by *Michael W. McConnell, Michael J. Woodruff, Samuel E. Ericsson, Kimberlee W. Colby, Philip E. Draheim,* and *Forest D. Montgomery;* for the General Conference of Seventh-day Adventists by *Warren L. Johns, Walter E. Carson,* and *Melvin B. Sabey;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin* and *Dennis Rapps;* for the United States Catholic Conference by *John A. Liekweg* and *Mark E. Chopko;* and for the Council on Religious Freedom by *Lee Boothby, James M. Parker, Robert W. Nixon,* and *Rolland Truman.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *Michael H. Gottesman, Robert M. Weinberg, David M. Silberman,* and *Laurence Gold;* for the Anti-Defamation League of B'nai B'rith by *Harold P. Weinberger, Justin J. Finger, Jeffrey P. Sinensky, Jill L. Kahn, Ruti G. Tietel,* and *Meyer Eisenberg;* for the Employment Law Center of the Legal Aid Society of San Francisco by *Joan M. Graff, Robert Barnes,* and *Robert E. Borton;* and for the Women's Legal Defense Fund et al. by *Donna Lenhoff.*

Jordan W. Lorence filed a brief for Concerned Women of America as *amicus curiae.*

[1] Section 702 provides in relevant part:

"This subchapter [i. e., Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment sented is whether applying the § 702 exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause of the First Amendment. The District Court held that it does, and these cases are here on direct appeal pursuant to 28 U. S. C. § 1252.[2] We reverse.

I

The Deseret Gymnasium (Gymnasium) in Salt Lake City, Utah, is a nonprofit facility, open to the public, run by the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (CPB), and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints (COP). The CPB and the COP are religious entities associated with The Church of Jesus Christ of Latter-day Saints (Church), an unincorporated religious association sometimes called the Mormon or LDS Church.[3]

Appellee Mayson worked at the Gymnasium for some 16 years as an assistant building engineer and then as building engineer. He was discharged in 1981 because he failed to qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples.[4]

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of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

[2] Title 28 U. S. C. § 1252 permits any party to appeal to this Court from an interlocutory or final judgment, decree, or order of any court of the United States holding an Act of Congress unconstitutional in any civil action to which the United States is a party.

[3] The CPB and the COP are "corporations sole" organized under Utah law to perform various activities on behalf of the Church. Both corporations are tax-exempt, nonprofit religious entities under § 501(c)(3) of the Internal Revenue Code. Appellees do not contest that the CPB and the COP are religious organizations for purposes of § 702.

[4] Temple recommends are issued only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco.

Mayson and others purporting to represent a class of plaintiffs brought an action against the CPB and the COP alleging, among other things, discrimination on the basis of religion in violation of § 703 of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2.[5] The defendants moved to dismiss this claim on the ground that § 702 shields them from liability. The plaintiffs contended that if construed to allow religious employers to discriminate on religious grounds in hiring for nonreligious jobs, § 702 violates the Establishment Clause.

The District Court first considered whether the facts of these cases require a decision on the plaintiffs' constitutional argument. Starting from the premise that the religious activities of religious employers can permissibly be exempted under § 702, the court developed a three-part test to determine whether an activity is religious.[6] Applying this test to

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[5] The District Court did not certify a class. The other plaintiffs below, whose claims are not at issue in this appeal, initially included former employees of Beehive Clothing Mills, which manufactures garments with religious significance for Church members. The complaint was amended to add as plaintiff a former employee of Deseret Industries, a division of the Church's Welfare Services Department. The District Court's rulings on the other plaintiffs' claims are described at n. 13, *infra*.

[6] The District Court described the test as follows:

"First, the court must look at the tie between the religious organization and the activity at issue with regard to such areas as financial affairs, day-to-day operations and management. Second, whether or not there is a close and substantial tie between the two, the court next must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration. If there is substantial connection between the activity in question and the religious organization's religious tenets or matters of church administration and the tie under the first part of the test is close, the court does not need to proceed any further and may declare the activity religious. . . . However, where the tie between the religious entity and activity in question is either close or remote under the first prong of the test and the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. It must consider the relationship between the nature of

Mayson's situation, the court found: first, that the Gymnasium is intimately connected to the Church financially and in matters of management; second, that there is no clear connection between the primary function which the Gymnasium performs and the religious beliefs and tenets of the Mormon Church or church administration;[7] and third, that none of Mayson's duties at the Gymnasium are "even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration," 594 F. Supp. 791, 802 (Utah 1984). The court concluded that Mayson's case involves nonreligious activity.[8]

The court next considered the plaintiffs' constitutional challenge to § 702. Applying the three-part test set out in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), the court first held that § 702 has the permissible secular purpose of "assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions . . . ." 594 F. Supp, at 812.[9]

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the job the employee is performing and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial relationship between the employee's job and church administration or the religious organization's rituals or tenets, the court must find that the activity in question is religious. If the relationship is not substantial, the activity is not religious." 594 F. Supp. 791, 799 (Utah 1984).

[7] The court found that "nothing in the running or purpose of [the Gymnasium] . . . suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration." *Id.*, at 800. The court emphasized that no contention was made that the religious doctrines of the Mormon Church either require religious discrimination in employment or treat physical exercise as a religious ritual. *Id.*, at 801.

[8] The court also considered and rejected the possibility that § 702 could be construed to exempt a religious organization only with respect to employment involving religious activities. *Id.*, at 803–804.

[9] The court examined in considerable detail the legislative history of the 1972 amendment of § 702. *Id.*, at 805–812. Prior to that time, § 702 exempted only the religious activities of religious employers from the statutory proscription against religious discrimination in employment. The

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The court concluded, however, that § 702 fails the second part of the *Lemon* test because the provision has the primary effect of advancing religion.[10] Among the considerations mentioned by the court were: that § 702 singles out religious entities for a benefit, rather than benefiting a broad grouping of which religious organizations are only a part;[11] that § 702 is not supported by long historical tradition;[12] and that § 702 burdens the free exercise rights of employees of religious institutions who work in nonreligious jobs. Finding that § 702 impermissibly sponsors religious organizations by granting them "an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices," *id.*, at 825, the court declared the statute unconstitutional as applied to secular activity. The court entered summary judgment in favor of Mayson pursuant to Federal Rule of Civil Procedure 54(b) and ordered him reinstated with backpay.[13] Subsequently, the court vacated its judg-

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1972 amendment extending the exemption to all activities of religious organizations was sponsored by Senators Allen and Ervin. Senator Ervin explained that the purpose of the amendment was to "take the political hands of Caesar off of the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972).

[10] The court rejected the defendants' arguments that § 702 is required both by the need to avoid excessive governmental entanglement with religion and by the Free Exercise Clause. 594 F. Supp., at 814–820.

[11] Cf., *e. g.*, *Mueller* v. *Allen*, 463 U. S. 388, 397 (1983) (provision of benefits to a broad spectrum of groups is an important index of secular effect); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 794 (1973) (narrowness of benefited class is an important factor in evaluating whether effect of a law violates the Establishment Clause).

[12] Cf. *Walz* v. *Tax Comm'n*, 397 U. S. 664, 676–679 (1970) (relying in part, in upholding property tax exemption for religious groups, on long historical tradition for such exemptions).

[13] The court declared that its determination regarding § 702 "applies with equal force to the [similar] state exemption as it relates to the facts of this case." 594 F. Supp., at 798. It deferred ruling on the plaintiffs' claim that § 702 violates the Due Process and Equal Protection Clauses of the United States Constitution, *id.*, at 828, and rejected the plaintiffs' state-

ment so that the United States could intervene to defend the constitutionality of § 702. After further briefing and argument the court affirmed its prior determination and reentered a final judgment for Mayson.

II

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 144–145 (1987) (footnote omitted). It is well established, too, that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U. S. 664, 673 (1970). There is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.*, at 669. At some point, accommodation may devolve into "an unlawful

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law claims of wrongful discharge and intentional infliction of emotional distress, *id.*, at 828–830.

Subsequently, the court concluded that disputed issues of material fact precluded summary judgment for the Beehive employees (see n. 5, *supra*). 618 F. Supp. 1013, 1016 (Utah 1985).

A plaintiff added by amendment of the complaint, Ralph Whitaker, claimed impermissible religious discrimination in his discharge from the position of truckdriver by Deseret Industries (Industries) based on his failure to qualify for a temple recommend. Industries, a division of the Church's Welfare Services Department, runs a workshop program for the handicapped, retarded, and unemployed, who sort and assemble items and refurbish donated goods for sale in Industries' thrift stores. Relying on the Church's emphasis on charity and work, the court held that Industries is a religious activity because "there is an intimate connection between Industries and the defendants and the Mormon Church and between the primary function of Industries and the religious tenets of the Church." *Id.*, at 1027. Finding no Establishment Clause violation in applying the § 702 exemption to Industries, the court granted summary judgment against Whitaker, who did not appeal.

fostering of religion," *Hobbie, supra,* at 145, but these are not such cases, in our view.

The private appellants contend that we should not apply the three-part *Lemon* approach, which is assertedly unsuited to judging the constitutionality of exemption statutes such as § 702. Brief for Appellants in No. 86-179, pp. 24-26. The argument is that an exemption statute will always have the effect of advancing religion and hence be invalid under the second (effects) part of the *Lemon* test, a result claimed to be inconsistent with cases such as *Walz* v. *Tax Comm'n, supra,* which upheld property tax exemptions for religious organizations. The first two of the three *Lemon* factors, however, were directly taken from pre-*Walz* decisions, 403 U. S., at 612-613, and *Walz* did not purport to depart from prior Establishment Clause cases, except by adding a consideration that became the third element of the *Lemon* test. 403 U. S., at 613. In any event, we need not reexamine *Lemon* as applied in this context, for the exemption involved here is in no way questionable under the *Lemon* analysis.

Lemon requires first that the law at issue serve a "secular legislative purpose." *Id.,* at 612. This does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement "that the government show a callous indifference to religious groups," *Zorach* v. *Clauson,* 343 U. S. 306, 314 (1952), and the Establishment Clause has never been so interpreted. Rather, *Lemon*'s "purpose" requirement aims at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.

Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. Appellees argue that there is no such purpose here because § 702 provided adequate protection for religious employers prior to the 1972 amendment, when it exempted only the religious activities of such employers from the statutory ban on religious discrimination. We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more. Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.[14] Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

After a detailed examination of the legislative history of the 1972 amendment, the District Court concluded that Congress' purpose was to minimize governmental "interfer[ence] with the decision-making process in religions." 594 F. Supp., at 812. We agree with the District Court that this purpose does not violate the Establishment Clause.

The second requirement under *Lemon* is that the law in question have "a principal or primary effect . . . that neither advances nor inhibits religion." 403 U. S., at 612. Undoubtedly, religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment to § 702. But religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in *Walz* v. *Tax Comm'n*, *supra*, or the loans of schoolbooks to schoolchildren, including parochial school students, upheld in *Board of Education* v. *Allen*, 392

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[14] The present cases are illustrative of the difficulties: the distinction between Deseret Industries, see n. 13, *supra*, and the Gymnasium is rather fine. Both activities are run on a nonprofit basis, and the CPB and the COP argue that the District Court failed to appreciate that the Gymnasium as well as Deseret Industries is expressive of the Church's religious values. Brief for Appellants in No. 86-179, pp. 6-8, 19.

U. S. 236 (1968). A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U. S., at 668. Accord, *Lemon*, 403 U. S., at 612.

The District Court appeared to fear that sustaining the exemption would permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world. 594 F. Supp., at 825. The cases before us, however, involve a nonprofit activity instituted over 75 years ago in the hope that "all who assemble here, and who come for the benefit of their health, and for physical blessings, [may] feel that they are in a house dedicated to the Lord." Dedicatory Prayer for the Gymnasium, quoted, 594 F. Supp., at 800–801, n. 15. These cases therefore do not implicate the apparent concerns of the District Court. Moreover, we find no persuasive evidence in the record before us that the Church's ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964. In such circumstances, we do not see how any advancement of religion achieved by the Gymnasium can be fairly attributed to the Government, as opposed to the Church.[15]

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[15] Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church (through the COP and the CPB), and not the Government, who put him to the choice of changing his religious practices or losing his job. This is a very different case than *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985). In *Caldor*, the Court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath. In effect, Connecticut had given the force of law to the employee's designa-

We find unpersuasive the District Court's reliance on the fact that § 702 singles out religious entities for a benefit. Although the Court has given weight to this consideration in its past decisions, see n. 11, *supra*, it has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. See *supra*, at 334–335. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

We are also unpersuaded by the District Court's reliance on the argument that § 702 is unsupported by long historical tradition. There was simply no need to consider the scope of the § 702 exemption until the 1964 Civil Rights Act was passed, and the fact that Congress concluded after eight years that the original exemption was unnecessarily narrow is a decision entitled to deference, not suspicion.

Appellees argue that § 702 offends equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers.[16] Appellees rely on *Larson* v. *Valente*, 456 U. S. 228, 246

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tion of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees. See *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 145, n. 11 (1987). In the present cases, appellee Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute. We find no merit in appellees' contention that § 702 "impermissibly delegates governmental power to religious employees and conveys a message of governmental endorsement of religious discrimination." Brief for Appellees 31.

[16] Appellees also argue that § 702 violates equal protection principles by giving religious employers greater leeway to discriminate than secular employers. It is not clear why appellees should have standing to represent the interests of secular employers, but in any event this argument is, practically speaking, merely a restatement of the first point.

(1982), for the proposition that a law drawing distinctions on religious grounds must be strictly scrutinized. But *Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, *ibid.*, and that laws "affording a uniform benefit to *all* religions" should be analyzed under *Lemon*, 456 U. S., at 252. In cases such as these, where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test. The proper inquiry is whether Congress has chosen a rational classification to further a legitimate end. We have already indicated that Congress acted with a legitimate purpose in expanding the § 702 exemption to cover all activities of religious employers. *Supra*, at 336. To dispose of appellees' equal protection argument, it suffices to hold—as we now do—that as applied to the nonprofit activities of religious employers, § 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.

It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case. The statute easily passes muster under the third part of the *Lemon* test.[17]

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[17] We have no occasion to pass on the argument of the COP and the CPB that the exemption to which they are entitled under § 702 is required by the Free Exercise Clause.

Appellees argue that § 702 creates danger of political divisiveness along political lines. As the Court stated in *Lynch* v. *Donnelly*, 465 U. S. 668, 684 (1984):

"[T]his Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct. And we decline to so hold today. This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into political

The judgment of the District Court is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I write separately to emphasize that my concurrence in the judgment rests on the fact that these cases involve a challenge to the application of § 702's categorical exemption to the activities of a *nonprofit* organization. I believe that the particular character of nonprofit activity makes inappropriate a case-by-case determination whether its nature is religious or secular.

These cases present a confrontation between the rights of religious organizations and those of individuals. Any exemption from Title VII's proscription on religious discrimination necessarily has the effect of burdening the religious liberty of prospective and current employees. An exemption says that a person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or, as in these cases, employment itself.[1]

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divisiveness is even called for, *Mueller* v. *Allen*, 463 U. S. 388, 403–404, n. 11 (1983)."

[1] The fact that a religious organization is permitted, rather than required, to impose this burden is irrelevant; what is significant is that the burden is the effect of the exemption. See *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971). An exemption by its nature merely permits certain behavior, but that has never stopped this Court from examining the *effect* of exemptions that would free religion from regulations placed on others. See, *e. g.*, *United States* v. *Lee*, 455 U. S. 252, 261 (1982) ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees"); *Walz* v. *Tax Comm'n*, 397 U. S. 664, 674 (1970) (legislative purpose in granting tax exemption not determinative; "[w]e must also be sure that the end result—the effect—is not an excessive government entanglement with religion"); see also *Wisconsin* v. *Yoder*, 406 U. S. 205, 220–221 (1972) ("The Court must not ignore the danger that an exception from a general obligation of citizenship on reli-

The potential for coercion created by such a provision is in serious tension with our commitment to individual freedom of conscience in matters of religious belief.[2]

At the same time, religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to:

> "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause." Laycock, Towards a General Theory of the Religion Clauses: The

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gious grounds may run afoul of the Establishment Clause"). This approach reflects concern not only about the impact of exemptions on others, but also awareness that:

> "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement . . . of religion, a core purpose of the Establishment Clause is violated." *Grand Rapids School Dist.* v. *Ball*, 473 U. S. 373, 389 (1985).

In these cases, as JUSTICE O'CONNOR cogently observes in her concurrence, "[t]he Church had the power to put [appellee] Mayson to a choice of qualifying for a temple recommend or losing his job because the *Government* had lifted from religious organizations the general regulatory burden imposed by § 702." *Post*, at 347.

[2] As James Madison expressed it:

> "[W]e hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." J. Madison, Memorial and Remonstrance Against Religious Assessment, in 2 Writings of James Madison 184 (G. Hunt ed. 1901) (quoting Virginia Declaration of Rights, Art. 16).

See also *Wallace* v. *Jaffree*, 472 U. S. 38, 50 (1985) ("[T]he Court has identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment").

> Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373, 1389 (1981).

See also *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U. S. 696 (1976) (church has interest in effecting binding resolution of internal governance disputes); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U. S. 94 (1952) (state statute purporting to transfer administrative control from one church authority to another violates Free Exercise Clause). For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.[3] Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.

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[3] See, *e. g.*, K. Barth, The Christian Community and the Civil Community, in Community, State and Church 149 (1960); Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983). Cf. Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. Cal. L. Rev. 551, 558 (1985) (tradition represents "a particular history or narrative, in which the central motif is an aspiration to a particular form of life, to certain projects, goals, [and] ideals, and the central discourse . . . is an argument . . . about how that form of life is to be cultivated and revised").

This rationale suggests that, ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities, so that a determination should be made in each case whether an activity is religious or secular. This is because the infringement on religious liberty that results from conditioning performance of *secular* activity upon religious belief cannot be defended as necessary for the community's self-definition. Furthermore, the authorization of discrimination in such circumstances is not an accommodation that simply enables a church to gain members by the normal means of prescribing the terms of membership for those who seek to participate in furthering the mission of the community. Rather, it puts at the disposal of religion the added advantages of economic leverage in the secular realm. As a result, the authorization of religious discrimination with respect to nonreligious activities goes beyond reasonable accommodation, and has the effect of furthering religion in violation of the Establishment Clause. See *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971).

What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. See *id.*, at 613. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

The risk of chilling religious organizations is most likely to arise with respect to *nonprofit* activities. The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In contrast to a for-profit corporation, a nonprofit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. See generally Hansmann, The Role of Nonprofit Enterprise, 89 Yale L. J. 835 (1980). This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose. Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.[4]

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[4] Until quite recently it was common for state laws to permit an entity to incorporate as a nonprofit only if formed to serve one or more of a limited set of purposes. Hansmann, The Role of Nonprofit Enterprise, 89 Yale L. J. 835, 839 (1980). Many States, however, now permit the formation of a nonprofit corporation for any lawful purpose. *Ibid.* If it were possible easily to transform an enterprise that appeared commercial in substance into one nonprofit in form, a church's decision to do so might signal that the church regarded the religious character of an entity as so significant that it was willing to forgo direct financial benefits in order to be able to hire persons committed to the church's mission. Nonetheless, if experience proved that nonprofit incorporation was frequently used simply to evade Title VII, I would find it necessary to reconsider the judgment in these cases.

Nonprofit activities therefore are most likely to present cases in which characterization of the activity as religious or secular will be a close question. If there is a danger that a religious organization will be deterred from classifying as religious those activities it actually regards as religious, it is likely to be in this domain.[5] This substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities. Such an exemption demarcates a sphere of deference with respect to those activities most likely to be religious. It permits infringement on employee free exercise rights in those instances in which discrimination is most likely to reflect a religious community's self-definition. While not every nonprofit activity may be operated for religious purposes, the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion.[6]

Sensitivity to individual religious freedom dictates that religious discrimination be permitted only with respect to employment in religious activities. Concern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce. We cannot escape the fact that these aims are in tension. Because of the nature of nonprofit activities, I believe that a categorical exemption for such enterprises appropriately balances these competing concerns. As a result, I concur in the Court's judgment that the nonprofit Deseret Gymnasium may avail itself of an automatic exemption from Title VII's proscription on religious discrimination.

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[5] Furthermore, as JUSTICE O'CONNOR notes in her excellent concurrence, when an exemption is provided for nonprofit activity, "the objective observer should perceive the government action as an accommodation of the exercise of religion, rather than as a government endorsement of religion." *Post*, at 349.

[6] It is also conceivable that some for-profit activities could have a religious character, so that religious discrimination with respect to these activities would be justified in some cases. The cases before us, however, involve a nonprofit organization; I believe that a *categorical* exemption authorizing discrimination is particularly appropriate for such entities, because claims that they possess a religious dimension will be especially colorable.

JUSTICE BLACKMUN, concurring in the judgment.

Essentially for the reasons set forth in JUSTICE O'CONNOR's opinion, particularly the third and final paragraphs thereof, I too, concur in the judgment of the Court. I fully agree that the distinction drawn by the Court seems "to obscure far more than to enlighten," as JUSTICE O'CONNOR states, *post*, at 347, and that, surely, the "question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open," *post*, at 349.

JUSTICE O'CONNOR, concurring in the judgment.

Although I agree with the judgment of the Court, I write separately to note that this action once again illustrates certain difficulties inherent in the Court's use of the test articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612-613 (1971). See *Wallace* v. *Jaffree*, 472 U. S. 38, 67 (1985) (O'CONNOR, J., concurring in judgment); *Lynch* v. *Donnelly*, 465 U. S. 668, 687 (1984) (O'CONNOR, J., concurring). As a result of this problematic analysis, while the holding of the opinion for the Court extends only to nonprofit organizations, its reasoning fails to acknowledge that the amended § 702, 42 U. S. C. § 2000e–1, raises different questions as it is applied to profit and nonprofit organizations.

In *Wallace* v. *Jaffree*, *supra*, I noted a tension in the Court's use of the *Lemon* test to evaluate an Establishment Clause challenge to government efforts to accommodate the free exercise of religion:

> "On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations.

> By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights." *Wallace* v. *Jaffree*, *supra*, at 82.

In my view, the opinion for the Court leans toward the second of the two unacceptable options described above. While acknowledging that "[u]ndoubtedly, religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment to § 702," the Court seems to suggest that the "effects" prong of the *Lemon* test is not at all implicated as long as the government action can be characterized as "allowing" religious organizations to advance religion, in contrast to government action directly advancing religion. *Ante*, at 337. This distinction seems to me to obscure far more than to enlighten. Almost any government benefit to religion could be recharacterized as simply "allowing" a religion to better advance itself, unless perhaps it involved actual proselytization by government agents. In nearly every case of a government benefit to religion, the religious mission would not be advanced if the religion did not take advantage of the benefit; even a direct financial subsidy to a religious organization would not advance religion if for some reason the organization failed to make any use of the funds. It is for this same reason that there is little significance to the Court's observation that it was the Church rather than the Government that penalized Mayson's refusal to adhere to Church doctrine. *Ante*, at 337, n. 15. The Church had the power to put Mayson to a choice of qualifying for a temple recommend or losing his job because *the Government* had lifted from religious organizations the general regulatory burden imposed by § 702.

The necessary first step in evaluating an Establishment Clause challenge to a government action lifting from religious organizations a generally applicable regulatory burden is to recognize that such government action *does* have the effect of advancing religion. The necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations. As I have suggested in earlier opinions, the inquiry framed by the *Lemon* test should be "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." *Wallace*, 472 U. S., at 69. To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute. *Id.*, at 76. Of course, in order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action. The determination whether the objective observer will perceive an endorsement of religion "is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch* v. *Donnelly*, *supra*, at 693–694.

The above framework, I believe, helps clarify why the amended § 702 raises different questions as it is applied to nonprofit and for-profit organizations. As JUSTICE BRENNAN observes in his concurrence: "The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation." *Ante*, at 344 (opinion concurring in judgment). These cases involve a Government decision to lift from a nonprofit activity of a religious organization the burden of demonstrating that the particular nonprofit activity is religious as well as the burden of refraining from discriminating on the basis of religion. Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.

It is not clear, however, that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization. While I express no opinion on the issue, I emphasize that under the holding of the Court, and under my view of the appropriate Establishment Clause analysis, the question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open.

McNALLY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86-234. Argued April 22, 1987—Decided June 24, 1987*

The federal mail fraud statute, 18 U. S. C. § 1341, prohibits the use of the mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Petitioners Gray, a former Kentucky official, and McNally, a private individual, along with one Howard Hunt, the former chairman of the Commonwealth's Democratic Party, were charged with violating § 1341 by devising a scheme to defraud the Commonwealth's citizens and government of their "intangible right" to have the Commonwealth's affairs conducted honestly, and to obtain money by means of false pretenses and the concealment of material facts. After informing the jury of the charges, the District Court instructed the jury that the defendants' alleged scheme could be made out either by finding: (1) that Hunt had *de facto* control over the award of the Commonwealth's workmen's compensation insurance contract; that he obtained commission payments from the company awarded this contract which were mailed to a company he owned and controlled with petitioners, without disclosing his ownership interest to commonwealth officials; and that petitioners aided in the scheme; or (2) that Gray had supervisory authority over the insurance when his company received payments; that he did not disclose his interest in the company to commonwealth officials; and that McNally aided and abetted him. The jury convicted petitioners, and the Court of Appeals affirmed, relying on a line of decisions holding that § 1341 proscribes schemes to defraud citizens of their intangible rights to honest and impartial government.

Held: The jury charge permitted a conviction for conduct not within the reach of § 1341. Pp. 356-361.

(a) The language and legislative history of § 1341 demonstrate that it is limited in scope to the protection of money or property rights, and does not extend to the intangible right of the citizenry to good government. The argument that, because the statutory phrases "to defraud" and "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" appear in the disjunctive, they should be construed independently so that "a scheme or artifice to de-

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*Together with No. 86-286, *Gray* v. *United States*, also on certiorari to the same court.

fraud" may include a scheme designed to deprive parties of intangible rights is not persuasive. The words "to defraud" commonly refer to wronging one in his property rights by dishonest methods, and there is nothing to indicate that Congress meant to depart from this common understanding when it enacted § 1341 in its present form. Rather, the statute was amended to include the second phrase simply to make it clear that it reaches false promises and misrepresentations as to the future as well as other frauds involving money or property. Pp. 356–360.

(b) A state officer does not violate § 1341 if he chooses an insurance agency to provide the State's insurance but specifies that the agency must share its commissions with another agency in which the officer has an ownership interest and hence profits from the commissions. Here, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property or would have paid a lower premium or secured better insurance in the absence of the alleged scheme. In fact, the commissions Hunt and Gray received were not the Commonwealth's money. Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, it would have paid the insurance premium to some agency, and Hunt and Gray simply asserted control that the Commonwealth might not otherwise have made over the payment of insurance commissions. Moreover, although the Government relies in part on the assertion that petitioners obtained property by means of false representations to the company awarded the insurance contract, there was nothing in the charge that required such a finding. Pp. 360–361.

790 F. 2d 1290, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in Parts I, II, and III of which O'CONNOR, J., joined, *post*, p. 362.

Carter G. Phillips argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 86–286 were *James A. Shuffett*, *William E. Johnson*, and *Benjamin W. Heineman, Jr.* *Frank E. Haddad, Jr.*, filed briefs for petitioner in No. 86–234.

Deputy Solicitor General Ayer argued the cause for the United States in both cases. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Weld*, *Christopher J. Wright*, and *Sara Criscitelli*.

JUSTICE WHITE delivered the opinion of the Court.

This action involves the prosecution of petitioner Gray, a former public official of the Commonwealth of Kentucky, and petitioner McNally, a private individual, for alleged violation of the federal mail fraud statute, 18 U. S. C. § 1341.[1] The prosecution's principal theory of the case, which was accepted by the courts below, was that petitioners' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain "intangible rights," such as the right to have the Commonwealth's affairs conducted honestly. We must consider whether the jury charge permitted a conviction for conduct not within the scope of the mail fraud statute.

We accept for the sake of argument the Government's view of the evidence, as follows. Petitioners and a third individual, Howard P. "Sonny" Hunt, were politically active in the Democratic Party in the Commonwealth of Kentucky during the 1970's. After Democrat Julian Carroll was elected Governor of Kentucky in 1974, Hunt was made chairman of the state Democratic Party and given *de facto* control over selecting the insurance agencies from which the Commonwealth would purchase its policies. In 1975, the Wombwell Insurance Company of Lexington, Kentucky (Wombwell), which since 1971 had acted as the Commonwealth's agent for securing a workmen's compensation policy, agreed with Hunt that in exchange for a continued agency relationship it would share any resulting commissions in excess of $50,000 a year with other insurance agencies specified by him. The commissions in question were paid to Wombwell by the large insurance companies from which it secured coverage for the Commonwealth.

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[1] Section 1341 provides in pertinent part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, [uses the mails or causes them to be used], shall be fined not more than $1,000 or imprisoned not more than five years, or both."

From 1975 to 1979, Wombwell funneled $851,000 in commissions to 21 separate insurance agencies designated by Hunt. Among the recipients of these payments was Seton Investments, Inc. (Seton), a company controlled by Hunt and petitioner Gray and nominally owned and operated by petitioner McNally.

Gray served as Secretary of Public Protection and Regulation from 1976 to 1978 and also as Secretary of the Governor's Cabinet from 1977 to 1979. Prior to his 1976 appointment, he and Hunt established Seton for the sole purpose of sharing in the commissions distributed by Wombwell. Wombwell paid some $200,000 to Seton between 1975 and 1979, and the money was used to benefit Gray and Hunt. Pursuant to Hunt's direction, Wombwell also made excess commission payments to the Snodgrass Insurance Agency, which in turn gave the money to McNally.

On account of the foregoing activities, Hunt was charged with and pleaded guilty to mail and tax fraud and was sentenced to three years' imprisonment. Petitioners were charged with one count of conspiracy and seven counts of mail fraud, six of which were dismissed before trial.[2] The remaining mail fraud count was based on the mailing of a commission check to Wombwell by the insurance company from which it had secured coverage for the State. This count alleged that petitioners had devised a scheme (1) to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) to obtain, directly and indirectly, money and other things of value by means of false pretenses and the concealment of material facts.[3] The conspiracy count alleged that petitioners had (1) conspired to violate the mail fraud statute through the scheme just described and (2) conspired to defraud the United States by obstructing the collection of federal taxes.

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[2] The six counts dismissed were based on the mailing of Seton's tax returns. The Court of Appeals held that mailings required by law cannot be made the basis for liability under § 1341 unless the documents are themselves false, see *Parr* v. *United States*, 363 U. S. 370 (1960), and that the six counts were properly dismissed since the indictment did not allege that Seton's tax returns were false. The Government has not sought review of this holding.

After informing the jury of the charges in the indictment,[4] the District Court instructed that the scheme to defraud the citizens of Kentucky and to obtain money by false pretenses and concealment could be made out by either of two sets of findings: (1) that Hunt had *de facto* control over the award of the workmen's compensation insurance contract to Wombwell from 1975 to 1979; that he directed payments of commissions from this contract to Seton, an entity in which he had an ownership interest, without disclosing that interest to persons in state government whose actions or deliberations could have been affected by the disclosure; and that petitioners, or either of them, aided and abetted Hunt in that scheme; or (2) that Gray, in either of his appointed positions, had supervisory authority regarding the Commonwealth's workmen's compensation insurance at a time when Seton received commissions; that Gray had an ownership interest in Seton and did not disclose that interest to persons in state government whose actions or deliberations could have been affected by that disclosure; and that McNally aided and abetted Gray (the latter finding going only to McNally's guilt).

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[3] The mail fraud count also alleged that petitioners' fraudulent scheme had the purpose of defrauding the citizens and government of Kentucky of their right to be made aware of all relevant facts when selecting an insurance agent to write the Commonwealth's workmen's compensation insurance policy. The District Court did not instruct on this purpose, holding that it was subsumed in the purpose to deny the right to honest government.

[4] The instruction summarized the charges as follows:

"Count 4 of the Indictment charges in part that the defendants devised a scheme or artifice to:

"(a)(1) defraud the citizens of the Commonwealth of Kentucky and its governmental departments, agencies, officials and employees of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud; and,

"(2) obtain (directly and indirectly) money and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of facts.

"And for the purpose of executing the aforesaid scheme, the defendants, James E. Gray and Charles J. McNally, and Howard P. 'Sonny' Hunt, Jr., and others, did place and cause to be placed in a post office or authorized deposit for mail matter, matters and things to be sent and delivered by the Postal Service, and did take and receive and cause to be taken and received therefrom such matters and things and did knowingly cause to be delivered thereon and at the place at which it was directed to be delivered by the person to whom it was addressed, matters and things.

"(b) Defraud the United States by impeding, impairing, and obstructing and defeating the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States of America in the ascertainment, computation, assessment and collection of federal taxes." Brief for United States 9–10, n. 8.

The Government concedes that it was error for the District Court to include the instruction on tax fraud in the substantive mail fraud instruction, see *id.*, at 11, n. 9, but the effect of that error is not now at issue.

The jury convicted petitioners on both the mail fraud and conspiracy counts, and the Court of Appeals affirmed the convictions. 790 F. 2d 1290 (CA6 1986). In affirming the substantive mail fraud conviction, the court relied on a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government. See, *e. g., United States* v. *Mandel*, 591 F. 2d 1347 (CA4 1979), aff'd in relevant part, 602 F. 2d 653 (en banc), cert. denied, 445 U. S. 961 (1980). Under these cases, a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud. Also, an individual without formal office may be held to be a public fiduciary if others rely on him "'because of a special relationship in the government'" and he in fact makes governmental decisions. 790 F. 2d, at 1296 (quoting *United States* v. *Margiotta*, 688 F. 2d 108, 122 (CA2 1982), cert. denied, 461 U. S. 913 (1983)). The Court of Appeals held that Hunt was such a fiduciary because he "substantially participated in governmental affairs and exercised significant, if not exclusive, control over awarding the workmen's compensation insurance contract to Wombwell and the payment of monetary kickbacks to Seton." 790 F. 2d, at 1296.

We granted certiorari, 479 U. S. 1005 (1986), and now reverse.

The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government. As first enacted in 1872, as part of a recodification of the postal laws, the statute contained a general proscription against using the mails to initiate correspondence in furtherance of "any scheme or artifice to defraud." The sponsor of the recodification stated, in apparent reference to the antifraud provision, that measures were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."[5] Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.

Durland v. *United States*, 161 U. S. 306 (1896), the first case in which this Court construed the meaning of the phrase "any scheme or artifice to defraud," held that the phrase is to be interpreted broadly insofar as property rights are concerned, but did not indicate that the statute had a more extensive reach. The Court rejected the argument that "the statute reaches only such cases as, at common law, would come within the definition of 'false pretences,' in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future." *Id.*, at 312. Instead, it construed the statute to "includ[e] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." *Id.*, at 313. Accordingly, the defendant's use of the mails to sell bonds which he did not intend to honor was within the statute. The Court explained that "[i]t was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed . . . ." *Id.*, at 314.

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[5] Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth). These remarks were made during the debate on H. R. 2295, the recodification legislation introduced during the 41st Congress. Representative Farnsworth proceeded to describe a scheme whereby the mail was used to solicit the purchase by greedy and unwary persons of counterfeit bills, which were never delivered.

The recodification bill was not passed by the 41st Congress, but was reintroduced and passed by the 42d Congress with the antifraud section intact. Act of June 8, 1872, ch. 335, §§ 149 and 301, 17 Stat. 302 and 323.

Congress codified the holding of *Durland* in 1909, and in doing so gave further indication that the statute's purpose is protecting property rights.[6] The amendment added the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after the original phrase "any scheme or artifice to defraud." Act of Mar. 4, 1909, ch. 321, §215, 35 Stat. 1130.[7] The new language is based on the statement in *Durland* that the statute reaches "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." 161 U. S., at 313. However, instead of the phrase "everything designed to defraud" Congress used the words "[any scheme or artifice] for obtaining money or property."

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[6] Prior to *Durland* Congress had amended the statute to add language expressly reaching schemes of the period, many of the same nature as those mentioned by Representative Farnsworth in 1870, see n. 5, *supra*, dealing or pretending to deal in counterfeit currency under such names as "green coin" or "green cigars." Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873. The addition of this language appears to have been nothing more than a reconfirmation of the statute's original purpose in the face of some disagreement among the lower federal courts as to whether the statute should be broadly or narrowly read. See Rakoff, The Federal Mail Fraud Statute, 18 Duquesne L. Rev. 771, 790–799, 808–809 (1980). Some of the language added in 1889 was removed in 1948 in an amendment (Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763) designed to remove surplusage without changing the meaning of the statute. See H. R. Rep. No. 304, 80th Cong., 1st Sess., A100 (1947). Post-1948 amendments to the statute have been technical in nature. The last substantive amendment of the statute, then, was the codification of the holding of *Durland*, and other changes not relevant here, in 1909.

[7] The new language was suggested in the Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States,

After 1909, therefore, the mail fraud statute criminalized schemes or artifices "to defraud" or "for obtaining money or property by means of false or fraudulent pretenses, representation, or promises . . . ." Because the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property. This is the approach that has been taken by each of the Courts of Appeals that has addressed the issue: schemes to defraud include those designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly. See, *e. g.*, *United States* v. *Clapps*, 732 F. 2d 1148, 1152 (CA3 1984); *United States* v. *States*, 488 F. 2d 761, 764 (CA8 1973).

As the Court long ago stated, however, the words "to defraud" commonly refer "to wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." *Hammerschmidt* v. *United States*, 265 U. S. 182, 188 (1924).[8] The codification of the holding in *Durland*

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which cited *Durland* in the margin of its Report. See S. Doc. No. 68, 57th Cong., 1st Sess., pt. 2, 63, 64 (1901). The sponsor of the 1909 legislation did not address the significance of the new language, stating that it was self-explanatory. 42 Cong. Rec. 1026 (1908) (remarks of Sen. Heyburn).

[8] *Hammerschmidt* concerned the scope of the predecessor of 18 U. S. C. § 371, which makes criminal any conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." *Hammer-*

in 1909 does not indicate that Congress was departing from this common understanding. As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.

We believe that Congress' intent in passing the mail fraud statute was to prevent the use of the mails in furtherance of such schemes. The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Con-

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schmidt indicates, in regard to that statute, that while "[t]o conspire to defraud the United States means primarily to cheat the Government out of property or money, . . . it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." 265 U. S., at 188. Other cases have held that § 371 reaches conspiracies other than those directed at property interests. See, *e. g., Haas* v. *Henkel*, 216 U. S. 462, 480 (1910) (predecessor of § 371 reaches conspiracy to defraud the Government by bribing a Government official to make an advance disclosure of a cotton crop report); *Glasser* v. *United States*, 315 U. S. 60 (1942) (predecessor of § 371 reaches conspiracy to defraud the United States by bribing a United States attorney). However, we believe that this broad construction of § 371 is based on a consideration not applicable to the mail fraud statute.

In *Curley* v. *United States*, 130 F. 1 (CA1 1904), cited with approval in *Haas* v. *Henkel*, *supra*, the court stated: "Quite likely the word 'defraud,' as ordinarily used in the common law, and as used in English statutes and in the statutes of our states, enacted with the object of protecting property and property rights of communities and individuals, as well as of municipal governments, which exist largely for the purpose of administering local financial affairs, has reference to frauds relating to money and property." 130 F., at 6–7. The court concluded, however, that "[a] statute which . . . has for its object the protection of the individual property rights of the members of the civic body, is one thing; a statute which has for its object the protection and welfare of the government alone, which exists for the purpose of administering itself in the interests of the public, [is] quite another." *Id.*, at 7. Section 371 is a statute aimed at protecting the Federal Government alone; however, the mail fraud statute, as we have indicated, had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interests as property holder.

gress has spoken in clear and definite language. *United States* v. *Bass*, 404 U. S. 336, 347 (1971); *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952). See also *Rewis* v. *United States*, 401 U. S. 808, 812 (1971). As the Court said in a mail fraud case years ago: "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo* v. *United States*, 272 U. S. 620, 629 (1926). Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

For purposes of this action, we assume that Hunt, as well as Gray, was a state officer. The issue is thus whether a state officer violates the mail fraud statute if he chooses an insurance agent to provide insurance for the State but specifies that the agent must share its commissions with other named insurance agencies, in one of which the officer has an ownership interest and hence profits when his agency receives part of the commissions. We note that as the action comes to us, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance. Hunt and Gray received part of the commissions but those commissions were not the Commonwealth's money. Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, the premium for insurance would have been paid to some agency, and what Hunt and Gray did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent.[*] Although the Government now relies in part on the assertion that petitioners obtained property by means of false representations to Wombwell, Brief for United States 20–21, n. 17, there was nothing in the jury charge that required such a finding. We hold, therefore, that the jury instruction on the substantive mail fraud count permitted a conviction for conduct not within the reach of § 1341.

The Government concedes that if petitioners' substantive mail fraud convictions are reversed their conspiracy convictions should also be reversed. *Id.*, at 36, n. 28.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

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[*] JUSTICE STEVENS would affirm the convictions even though it was not charged that requiring the Wombwell agency to share commissions violated state law. We should assume that it did not. For the same reason we should assume that it was not illegal under state law for Hunt and Gray to own one of the agencies sharing in the commissions and hence to profit from the arrangement, whether or not they disclosed it to others in the state government. It is worth observing as well that it was not alleged that the mail fraud statute would have been violated had Hunt and Gray reported to state officials the fact of their financial gain. The violation asserted is the failure to disclose their financial interest, even if state law did not require it, to other persons in the state government whose actions could have been affected by the disclosure. It was in this way that the indictment charged that the people of Kentucky had been deprived of their right to have the Commonwealth's affairs conducted honestly.

It may well be that Congress could criminalize using the mails to further a state officer's efforts to profit from governmental decisions he is empowered to make or over which he has some supervisory authority, even if there is no state law proscribing his profiteering or even if state law expressly authorized it. But if state law expressly permitted or did not forbid a state officer such as Gray to have an ownership interest in an insurance agency handling the State's insurance, it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins as to Parts I, II, and III, dissenting.

Congress has broadly prohibited the use of the United States mails to carry out "any scheme or artifice to defraud." 18 U. S. C. § 1341. The question presented is whether that prohibition is restricted to fraudulent schemes to deprive others of money or property, or whether it also includes fraudulent schemes to deprive individuals of other rights to which they are entitled. Specifically, we must decide whether the statute's prohibition embraces a secret agreement by state officials to place the State's workmen's compensation insurance with a particular agency in exchange for that company's agreement to share a major portion of its commissions with a list of agents provided by the officials, including sham agencies under the control of the officials themselves.

The same question of statutory construction has arisen in a variety of contexts over the past few decades. In the public sector, judges, State Governors, chairmen of state political parties, state cabinet officers, city aldermen, Congressmen and many other state and federal officials have been convicted of defrauding citizens of their right to the honest services of their governmental officials.[1] In most of these cases, the officials have secretly made governmental decisions with the objective of benefiting themselves or promoting their own interests, instead of fulfilling their legal commitment to provide the citizens of the State or local government with their loyal service and honest government. Similarly, many elected officials and their campaign workers have been convicted of mail fraud when they have used the mails to falsify votes, thus defrauding the citizenry of its right to an honest election.[2] In the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information.[3] In other cases, defendants

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[1] See, *e. g., United States* v. *Holzer*, 816 F. 2d 304 (CA7 1987) (county judge); *United States* v. *Silvano*, 812 F. 2d 754 (CA1 1987) (city budget director); *United States* v. *Barber*, 668 F. 2d 778 (CA4) (State Alcoholic Beverage Control Commissioner), cert. denied, 459 U. S. 829 (1982); *United States* v. *Margiotta*, 688 F. 2d 108 (CA2 1982) (party leader), cert. denied, 461 U. S. 913 (1983); *United States* v. *Diggs*, 198 U. S. App. D. C. 255, 613 F. 2d 988 (1979) (Congressman), cert. denied, 446 U. S. 982 (1980); *United States* v. *Mandel*, 591 F. 2d 1347 (CA4 1979) (Governor of Maryland), cert. denied, 445 U. S. 961 (1980); *United States* v. *Brown*, 540 F. 2d 364 (CA8 1976) (city building commissioner); *United States* v. *Bush*, 522 F. 2d 641 (CA7 1975) (city Director of Public Relations), cert. denied, 424 U. S. 977 (1976); *United States* v. *Keane*, 522 F. 2d 534 (CA7 1975) (city alderman), cert. denied, 424 U. S. 976 (1976); *United States* v. *Staszcuk*, 502 F. 2d 875 (CA7 1974) (city alderman), cert. denied, 423 U. S. 837 (1975); *United States* v. *Isaacs*, 493 F. 2d 1124 (CA7) (ex-Governor of Illinois and ex-Director of Illinois Department of Revenue), cert. denied, 417

U. S. 976 (1974); *United States* v. *Classic*, 35 F. Supp. 457 (ED La. 1940) (election commissioner).

Some private defendants have also been convicted of devising schemes through which public servants defraud the public. See, *e. g.*, *United States* v. *Lovett*, 811 F. 2d 979 (CA7 1987) (bribing mayor); *United States* v. *Alexander*, 741 F. 2d 962 (CA7 1984) (bribing judge), overruled on other grounds in *United States* v. *Ginsburg*, 773 F. 2d 798, 802 (CA7 1985) (en banc); *United States* v. *Rauhoff*, 525 F. 2d 1170 (CA7 1975) (bribing State Secretary of State); *United States* v. *Faser*, 303 F. Supp. 380 (ED La. 1969) (scheme to bribe state officials).

In *Shushan* v. *United States*, 117 F. 2d 110 (CA5), cert. denied, 313 U. S. 574 (1941), the Fifth Circuit upheld the mail fraud prosecution of a member of a Louisiana parish levy board for receiving kickbacks from the underwriters of a plan to refund outstanding bonds of the levy district. Explaining why it rejected the argument that no actual fraud had occurred because the refunding operation had actually been profitable to the levy board, the court stated:

"No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud." 117 F. 2d, at 115.

[2] See, *e. g.*, *United States* v. *Girdner*, 754 F. 2d 877 (CA10 1985) (candidate for state legislature); *United States* v. *Odom*, 736 F. 2d 104, 116, n. 13 (CA4 1984) (sheriff); *United States* v. *Clapps*, 732 F. 2d 1148, 1153 (CA3) (party chairman), cert. denied, 469 U. S. 1085 (1984); *United States* v. *States*, 488 F. 2d 761 (CA8 1973) (candidates for city office), cert. denied, 417 U. S. 909 (1974).

[3] See, *e. g.*, *United States* v. *Price*, 788 F. 2d 234 (CA4 1986), cert. pending *sub nom. McMahan* v. *United States*, No. 86-632; *United States*

have been found guilty of using the mails to defraud individuals of their rights to privacy and other nonmonetary rights.[4] All of these cases have something in common—they involved what the Court now refers to as "intangible rights." They also share something else in common. The many federal courts that have confronted the question whether these sorts of schemes constitute a "scheme or artifice to defraud" have uniformly and consistently read the statute in the same, sensible way. They have realized that nothing in the words "any scheme or artifice to defraud," or in the purpose of the statute, justifies limiting its application to schemes intended to deprive victims of money or property.

I

The mail fraud statute sets forth three separate prohibitions. It prohibits the use of the United States mails for the purpose of executing

> "[1] *any* scheme or artifice to defraud, [2] *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, [3] *or* to sell, dispose of, loan, exchange, alter, give away, distribute,

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v. *Boffa*, 688 F. 2d 919, 930–931 (CA3 1982); *United States* v. *Curry*, 681 F. 2d 406 (CA5 1982) (chairman of political action committee); *United States* v. *Bronston*, 658 F. 2d 920 (CA2 1981) (attorney), cert. denied, 456 U. S. 915 (1982); *United States* v. *Von Barta*, 635 F. 2d 999 (CA2 1980) (securities trader), cert. denied, 450 U. S. 998 (1981); *United States* v. *Bohonus*, 628 F. 2d 1167 (CA9) (insurance manager), cert. denied, 447 U. S. 928 (1980); *United States* v. *Bryza*, 522 F. 2d 414 (CA7 1975) (purchasing agent), cert. denied, 426 U. S. 912 (1976); *United States* v. *George*, 477 F. 2d 508 (CA7) (purchasing agent), cert. denied, 414 U. S. 827 (1973); *United States* v. *Procter & Gamble Co.*, 47 F. Supp. 676 (Mass. 1942) (attempt to bribe competitor's employee).

[4] See, *e. g.*, *United States* v. *Condolon*, 600 F. 2d 7 (CA4 1979) (wire fraud conviction related to bogus talent agency designed to seduce women); *United States* v. *Louderman*, 576 F. 2d 1383 (CA9) (scheme to fraudulently obtain confidential personal information), cert. denied, 439 U. S. 896 (1978); see also *United States* v. *Castor*, 558 F. 2d 379, 383 (CA7 1977) (fraudulent information on application for liquor license), cert. denied, 434 U. S. 1010 (1978).

supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article . . . ." 18 U. S. C. § 1341 (emphasis and brackets added).

As the language makes clear, each of these restrictions is independent. One can violate the second clause—obtaining money or property by false pretenses—even though one does not violate the third clause—counterfeiting. Similarly, one can violate the first clause—devising a scheme or artifice to defraud—without violating the counterfeiting provision. Until today it was also obvious that one could violate the first clause by devising a scheme or artifice to defraud, even though one did not violate the second clause by seeking to obtain money or property from his victim through false pretenses. Cf. *Streep* v. *United States*, 160 U. S. 128, 132–133 (1895). Every court to consider the matter had so held.[5] Yet, today, the Court, for all practical purposes, rejects this longstanding construction of the statute by imposing a requirement that a scheme or artifice to defraud does not violate the statute unless its purpose is to defraud someone of money or property. I am at a loss to understand the source or justification for this holding. Certainly no canon of statutory construction requires us to ignore the plain language of the provision.

In considering the scope of the mail fraud statute it is essential to remember Congress' purpose in enacting it. Congress sought to protect the integrity of the United States mails by not allowing them to be used as "instruments of crime." *United States* v. *Brewer*, 528 F. 2d 492, 498 (CA4 1975). See *Durland* v. *United States*, 161 U. S. 306, 314

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[5] See, *e. g.*, *Clapps*, *supra*, at 1152; *States*, *supra*, at 764; *United States* v. *Frankel*, 721 F. 2d 917, 920 (CA3 1983); *United States* v. *Scott*, 701 F. 2d 1340, 1343–1344 (CA11), cert. denied, 464 U. S. 856 (1983); *Margiotta*, *supra*, at 121; *United States* v. *Halbert*, 640 F. 2d 1000, 1007 (CA9 1981); *United States* v. *Classic*, 35 F. Supp. 457 (ED La. 1940); see also *ante*, at 358.

(1896); *Parr* v. *United States*, 363 U. S. 370, 389 (1960); *Gouled* v. *United States*, 273 F. 506, 508 (CA2), aff'd, 255 U. S. 298 (1921). "The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails. See *Badders* v. *United States*, 240 U. S. 391 . . . (1916)." *United States* v. *States*, 488 F. 2d 761, 767 (CA8 1973), cert. denied, 417 U. S. 909 (1974). Once this purpose is considered, it becomes clear that the construction the Court adopts today is senseless. Can it be that Congress sought to purge the mails of schemes to defraud citizens of money but was willing to tolerate schemes to defraud citizens of their right to an honest government, or to unbiased public officials? Is it at all rational to assume that Congress wanted to ensure that the mails not be used for petty crimes, but did not prohibit election fraud accomplished through mailing fictitious ballots? Given Congress' "broad purpose," I "find it difficult to believe, absent some indication in the statute itself or the legislative history, that Congress would have undercut sharply that purpose by hobbling federal prosecutors in their effort to combat" use of the mails for fraudulent schemes. *McElroy* v. *United States*, 455 U. S. 642, 655 (1982).

The limitation the Court adopts today shows no fidelity to Congress' words or purpose. The Court recognizes that the "money or property" limitation of the second clause may not actually apply to prosecutions under the first clause. See *ante*, at 358. But where else can such a limitation be derived from? A few examples of the types of frauds that have been prosecuted under the "intangible right" theory reveal that these schemes constitute "fraud" in every sense of the word, and that the "intangible right" theory plays an indispensable role in effectuating Congress' goal of preserving the integrity of the Postal Service.

In *States*, *supra*, two candidates running for the office of Committeeman in St. Louis, Missouri, used the United States mails in their scheme to falsify voter registration affidavits in order to carry out an extensive fraudulent write-in scheme. The candidates had their campaign workers fill in the affidavits with fictitious names and addresses, making sure that the mailing addresses were accessible to the campaign. Applications for absentee ballots were filed, and when they arrived through the mail, they were filled in with the candidates' names and mailed back. The candidates and one of their aides were convicted of mail fraud for having devised a scheme to defraud the voters, the residents, and the Board of Election Commissioners. The Court of Appeals affirmed the convictions, rejecting the defendants' arguments that they had not defrauded anyone since they never sought money or property. The court explained that the term "defraud" must be "construed to further the purpose of the statute; namely, to prohibit the misuse of the mails to further fraudulent enterprises." 488 F. 2d, at 764.

In *United States* v. *Rauhoff*, 525 F. 2d 1170 (CA7 1975), the defendant was part of a scheme that used the United States mail to facilitate its paying the Illinois Secretary of State approximately $50,000 a year in return for the Secretary's awarding the State's license plate contract to a certain company. In response to the argument that all parties to the scheme were reaping profits, and that nobody was defrauded, the Court of Appeals explained that the victims of the scheme were the "people of Illinois, who were defrauded of their right to have the business of the office of the Secretary of State conducted free from bribery." *Id.*, at 1175. Although it was not proved that the State or its citizens lost any money, it was and is clear that this was a scheme to defraud under § 1341.

There are scores of other examples of such schemes which, although not depriving anyone of money or property, are clearly schemes to defraud, and are clearly within the scope of Congress' purpose in enacting the mail fraud statute. See nn. 1–5, *supra*. Discussing the peculiar facts of each of them would only confirm the observation that fraud is "as old as falsehood and as versable as human ingenuity." *Weiss* v.

United States, 122 F. 2d 675, 681 (CA5), cert. denied, 314 U. S. 687 (1941). But, taken as a whole, these cases prove just how unwise today's judicial amendment of the mail fraud statute is.

II

The cases discussed above demonstrate that the construction the courts have consistently given the statute is consistent with the common understanding of the term "fraud," and Congress' intent in enacting the statute. It is also consistent with the manner in which the term has been interpreted in an analogous federal statute; the way the term was interpreted at the time of this statute's enactment; and the statute's scant legislative history. There is no reason, therefore, to upset the settled, sensible construction that the federal courts have consistently endorsed.

The term "defraud" is not unique to § 1341. Another federal statute, 18 U. S. C. § 371, uses the identical term in prohibiting conspiracies to "defraud the United States," and the construction we have given to that statute should be virtually dispositive here. In *Haas* v. *Henkel*, 216 U. S. 462 (1910), the Court, dealing with the predecessor to § 371, rejected the argument that there could be no conspiracy to defraud in the absence of contemplated monetary or property loss. "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Id.*, at 479. Again, in *Hammerschmidt* v. *United States*, 265 U. S. 182 (1924), the Court described the scope of the statute as prohibiting not only conspiracies to "cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Id.*, at 188.[6] It is thus clear that a conspiracy to defraud the United States does not require any evidence that the Government has suffered any property or pecuniary loss. See also *United States* v. *Barnow*, 239 U. S. 74, 79 (1915).

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[6] "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary

There is no basis for concluding that the term "defraud" means something different in § 1341 (first enacted in 1872) than what it means in § 371 (first enacted in 1867). Although § 371 includes the words "in any manner or for any purpose," those words only modify the underlying act—fraud, and if that term does not include nonproperty interests then our longstanding interpretation of § 371 is unjustified. In any event, § 1341 itself includes the expansive phrase "any scheme or artifice to defraud."

The Court nonetheless suggests that interpreting the two statutes differently can be justified because § 371 applies exclusively to frauds against the United States, while § 1341 benefits private individuals. *Ante*, at 358–359, n. 8. This argument is wide of the mark. The purpose of § 1341 is to protect the integrity of the United States Postal Service, and, as I have explained, it is ludicrous to think that a Congress intent on preserving the integrity of the Postal Service would have used the term "defraud" in a narrow sense so as to allow mailings whose purpose was merely to defraud citizens of rights other than money or property. There is, therefore, no reason to believe that Congress used the term "defraud" in a more limited way in § 1341 than it did in § 371.[7]

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that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." *Hammerschmidt* v. *United States*, 265 U. S., at 188.

It is extraordinary that the only support the Court presents for its narrow definition is some language in *Hammerschmidt*, see *ante*, at 358, even though *Hammerschmidt* itself goes on to expressly reject the notion that fraud is limited to interference with monetary or property rights.

[7] The prohibition against employing "any device, scheme, or artifice to defraud" in connection with transactions on a National Securities Exchange similarly does not require proof that specific individuals have suffered tan-

The Court is correct in pointing out that Congress intended to go beyond any common-law meaning of the word "defraud" in enacting § 371. See *ante*, at 358–359, n. 8, citing *United States* v. *Keitel*, 211 U. S. 370, 393 (1908). But we have also rejected the argument that the common-law meaning of the term "defraud" confines the scope of § 1341. See *Durland* v. *United States*, 161 U. S. 306 (1896).

Examination of the way the term "defraud" has long been defined, and was defined at the time of the statute's enactment, makes it clear that Congress' use of the term showed no intent to limit the statute to property loss. Cf. *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604 (1987) (looking to contemporaneous dictionary definitions in construing the word "race"). For example, Justice Story cites the definition of "fraud" as "applied to every artifice made use of by one person for the purpose of deceiving another," or as "any cunning, deception, or artifice used to circumvent cheat, or deceive another." 1 J. Story, Equity Jurisprudence § 186, pp. 189–190 (1870). Similarly, the law dictionaries of the era broadly defined the type of interests subject to deprivation by fraudulent action. One leading dictionary stated that "[t]o defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice." 1 Bouvier's Law Dictionary 530 (1897). Another dictionary defined "defraud" as "[t]o cheat; to deceive; to deprive of a right by an act of fraud . . . to withhold from another what is justly due him, or to deprive him of a right, by deception or artifice." W. Anderson, A Dictionary of

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gible losses. See *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 848 (CA2 1968), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969). By its terms, that language is broad enough to "reach *any* person engaged in *any* fraudulent scheme." *Chiarella* v. *United States*, 445 U. S. 222, 240 (1980) (Burger, C. J., dissenting). See also *Myzel* v. *Fields*, 386 F. 2d 718, 739 (CA8 1967), cert. denied, 390 U. S. 951 (1968); *A. T. Brod & Co.* v. *Perlow*, 375 F. 2d 393, 397 (CA2 1967).

Law 474 (1893). See also 1 Burrill's Law Dictionary 658–659 (1859).*

It is, in fact, apparent that the common law criminalized frauds beyond those involving "tangible rights." For example, in a case remarkably similar to the one before us, a public official was convicted for depriving the government of his honest services. See *Trial of Valentine Jones*, 31 How. St. Tr. 251 (1809). The case has been abstracted as follows:

> "A, a commissary-general of stores in the West Indies, makes contracts with B to supply stores, on the condition that B should divide the profits with A. A commits a misdemeanor." J. Stephen, Digest of The Criminal Law, Art. 121, p. 85 (3d ed. 1883).

By the same token, the crime of fraud has often included deceptive seduction, although that crime often includes no property or monetary loss. See *State* v. *Parker*, 114 Wash. 428, 195 P. 229 (1921); cf. *United States* v. *Condolon*, 600 F. 2d 7 (CA4 1979) (fraudulent scheme to seduce women supported wire fraud conviction). Of course, even if the term was not that expansively defined at common law, we have held that Congress went beyond the common-law definitions in enacting this statute. *Durland*, 161 U. S., at 313–314.

In a recent decision upholding the mail fraud conviction of an Illinois judge, despite the absence of proof that anyone suffered loss of tangible property, the Court of Appeals for the Seventh Circuit reaffirmed the broad meaning of the word "defraud." *United States* v. *Holzer*, 816 F. 2d 304 (1987). Writing for the court, Judge Posner explained:

> "Fraud in its elementary common law sense of deceit—and this is one of the meanings that fraud bears

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*Although there are surely cases and commentaries to be found which describe "fraud" in a more limited manner, none have been brought to our attention that reject the broader interpretations cited here. There is, of course, no doubt that the term "defraud" includes money and property interests, and the cases referring to such interests do not conflict with my understanding of the statute.

> in the statute, see *United States* v. *Dial*, 757 F. 2d 163, 168 (7th Cir. 1985)—includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud. When a judge is busily soliciting loans from counsel to one party, and not telling the opposing counsel (let alone the public), he is concealing material information in violation of his fiduciary obligations.
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> . . . . .
>
> "Second, the systematic and long-continued receipt of bribes by a public official, coupled with active efforts to conceal the bribe-taking from the public and the authorities . . . is fraud (again in its elementary sense of deceit, and quite possibly in other senses as well), even if it is the public rather than counsel that is being kept in the dark. It is irrelevant that, so far as appears, Holzer never ruled differently in a case because of a lawyer's willingness or unwillingness to make him a loan, so that his conduct caused no demonstrable loss either to a litigant or to the public at large. See, *e. g.*, *United States* v. *Keane*, 522 F. 2d 534, 541, 546 (7th Cir. 1975); *United States* v. *Lovett*, 811 F. 2d 979, 985 (7th Cir. 1987); *United States* v. *Manton*, 107 F. 2d 834, 846 (2d Cir. 1939). How can anyone prove how a judge would have ruled if he had not been bribed?" *Id.*, at 307–308.

The general definition of the term "defraud" does not support, much less compel, today's decision.

Even if there were historical evidence of a limited definition of "fraud," the Court's holding would reflect a strange interpretation of legislation enacted by the Congress in the 19th century. Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication. The notion that the meaning of the words "any scheme or artifice to defraud" was frozen by a special conception of the term recognized by Congress in 1872 is manifestly untenable. As Judge Posner put it:

> "The argument depends on the view that the meaning of fraud in the mail-fraud statute was frozen by the conception of fraud held by the framers of the statute when it was first passed back in the nineteenth century. This seems to us the opposite and equally untenable extreme from arguing that fraud is whatever strikes a judge as bad, but in any event the 'intangible rights' concept that the argument attacks is too well established in the courts of appeals for us to disturb." *Holzer*, 816 F. 2d, at 310.

Finally, there is nothing in the legislative history of the mail fraud statute that suggests that Congress intended the word "fraud" to have a narrower meaning in that statute than its common meaning and the meaning that it has in § 371. As originally enacted in 1872, the statute had but one class of prohibition: use of the mails as part of "any scheme or artifice to defraud." Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. The second clause, which prohibits "any scheme . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," was added in 1909. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. The purpose of the second clause was to codify this Court's holding in *Durland* that the Act prohibits false promises even if they did not qualify as "fraud" at common law. See *Durland*, 161 U. S., at 312–314. There is no evidence to suggest that Congress sought to limit the scope of the original prohibition, and its use of the disjunctive "or" demonstrates that it was adding to, not modifying, the original prohibition. See *Reiter* v.

Sonotone Corp., 442 U. S. 330, 339 (1979); see also *Streep* v. *United States*, 160 U. S., at 132–133.

Reviewing the general history of Congress' reactions to the courts' decisions interpreting the mail fraud statute also supports the reading the lower courts have attributed to § 1341. The general language in the mail fraud statute has repeatedly been construed to cover novel species of fraud, and Congress has repeatedly amended the statute in ways that support a broad interpretation of its basic thrust. That long history is accurately summarized in the following observations:

> "First enacted in 1872, the mail fraud statute, together with its lineal descendant, the wire fraud statute, has been characterized as the 'first line of defense' against virtually every new area of fraud to develop in the United States in the past century. Its applications, too numerous to catalog, cover not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity stock frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud, and bribery. In many of these and other areas, where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.
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> "During the past century, both Congress and the Supreme Court have repeatedly placed their stamps of approval on expansive use of the mail fraud statute. Indeed, each of the five legislative revisions of the statute has served to enlarge its coverage." Rakoff, The Federal Mail Fraud Statute, 18 Duquesne L. Rev. 772–773 (1980).

III

To support its crabbed construction of the Act, the Court makes a straightforward but unpersuasive argument. Since there is no explicit, unambiguous evidence that Congress actually contemplated "intangible rights" when it enacted the mail fraud statute in 1872, the Court explains, any ambiguity in the meaning of the criminal statute should be resolved in favor of lenity. The doctrine of lenity is, of course, sound, for the citizen is entitled to fair notice of what sort of conduct may give rise to punishment. But the Court's reliance on that doctrine in this case is misplaced for several reasons.

To begin with, "although 'criminal statutes are to be construed strictly . . . this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.'" *McElroy* v. *United States*, 455 U. S., at 658, quoting *United States* v. *Bramblett*, 348 U. S. 503, 509–510 (1955). Especially in light of the statutory purpose, I believe that § 1341 unambiguously prohibits all schemes to defraud that use the United States mails—whether or not they involve money or property.

In any event, this asserted ambiguity in the meaning of the word "defraud," if it ever existed, was removed by judicial construction long ago. Even if Chief Justice Taft's opinion for the Court in the *Hammerschmidt* case was not sufficient to make it perfectly clear that a fraud on the public need not deprive it of tangible property, the series of Court of Appeals' opinions applying this very statute to schemes to defraud a State and its citizens of their intangible right to honest and faithful government, notwithstanding the absence of evidence of tangible loss, removed any relevant ambiguity in this statute. Surely these petitioners knew that it would be unlawful to place Kentucky's insurance coverage with an agent who would secretly make hundreds of thousands of dollars available for the private use of petitioners, their relatives, and their paramours. This is, indeed, a strange application of the doctrine of lenity.[9]

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[9] When considering how much weight to accord to the doctrine of lenity, it is appropriate to identify the class of litigants that will benefit from the Court's ruling today. They are not uneducated, or even average, citizens. They are the most sophisticated practitioners of the art of government

I recognize that there may have been some overly expansive applications of § 1341 in the past. With no guidance from this Court, the Courts of Appeals have struggled to define just when conduct which is clearly unethical is also criminal. In some instances, however, such as voting fraud cases, the criminality of the scheme and the fraudulent use of the mails could not be clearer. It is sometimes difficult to define when there has been a scheme to defraud someone of intangible rights. But it is also sometimes difficult to decide when a tangible loss was caused by fraud. The fact that the exercise of judgment is sometimes difficult is no excuse for rejecting an entire doctrine that is both sound and faithful to the intent of Congress.

IV

Perhaps the most distressing aspect of the Court's action today is its casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present. The quality of this Court's work is most suspect when it stands alone, or virtually so, against a tide of well-considered opinions issued by state or federal courts. In these cases I am convinced that those judges correctly understood the intent of the Congress that enacted this statute. Even if I were not so persuaded, I could not join a rejection of such a longstanding, consistent interpretation of a federal statute. See *Commissioner of Internal Revenue* v. *Fink*, 483 U. S. 89, 101 (1987) (STEVENS, J., dissenting); *Citicorp Industrial Credit, Inc.* v.

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among us. There is an element of fiction in the presumption that every citizen is charged with a responsibility to know what the law is. But the array of government executives, judges, and legislators who have been accused, and convicted, of mail fraud under the well-settled construction of the statute that the Court renounces today are people who unquestionably knew that their conduct was unlawful. Cf. *Nash* v. *United States*, 229 U. S. 373, 377 (1913).

Brock, 483 U. S. 27, 40 (1987) (STEVENS, J., dissenting); *Runyon* v. *McCrary*, 427 U. S. 160, 189 (1976) (STEVENS, J., concurring).

In the long run, it is not clear how grave the ramifications of today's decision will be. Congress can, of course, negate it by amending the statute. Even without congressional action, prosecutions of corrupt officials who use the mails to further their schemes may continue since it will frequently be possible to prove some loss of money or property.[10] But many other types of fraudulent use of the mail will now be immune from prosecution. The possibilities that the decision's impact will be mitigated do not moderate my conviction that the Court has made a serious mistake. Nor do they erase my lingering questions about why a Court that has not been particularly receptive to the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision.

I respectfully dissent.

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[10] When a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer—who is not getting what he paid for. Additionally, "[i]f an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal." Restatement (Second) of Agency § 403 (1958). This duty may fulfill the Court's "money or property" requirement in most kickback schemes.

Of course, "the fact that a scheme may or may not violate State law does not determine whether it is within the proscriptions of the federal statute." *United States* v. *Edwards*, 458 F. 2d 875, 880 (CA5), cert. denied *sub nom. Huie* v. *United States*, 409 U. S. 891 (1972). See *Margiotta*, 688 F. 2d, at 124; *Mandel*, 591 F. 2d, at 1361; *Brown*, 540 F. 2d, at 374, n. 7; *Bush*, 522 F. 2d, at 646, n. 6. The mail fraud statute is a self-contained provision, which does not rely on any state enactments for its force. Cf. 18 U. S. C. § 1952 (b) (defining "unlawful activity" with reference to state law). The lack of a state statute forbidding the underlying conduct does not immunize a defendant from prosecution when he or she uses the United States mails as part of the scheme.

RANKIN ET AL. *v.* McPHERSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-2068. Argued March 23, 1987-Decided June 24, 1987

Respondent, a data-entry employee in a county Constable's office, was discharged for remarking to a co-worker, after hearing of an attempt on the President's life, "if they go for him again, I hope they get him." Respondent was not a commissioned peace officer, did not wear a uniform, was not authorized to make arrests or permitted to carry a gun, and was not brought by virtue of her job into contact with the public. Her duties were purely clerical, were limited solely to the civil process function of the Constable's office, and did not involve her in the office's minimal law enforcement activity. Her statement was made during a private conversation in a room not readily accessible to the public. The Constable fired petitioner because of the statement. She then brought suit in the Federal District Court under 42 U. S. C. § 1983, alleging that her discharge violated her First Amendment right to free speech under color of state law. The court upheld the discharge, but the Court of Appeals vacated and remanded, whereupon the District Court again ruled against respondent. However, the Court of Appeals reversed and remanded for determination of an appropriate remedy, holding that respondent's remark had addressed a matter of public concern, and that the governmental interest in maintaining efficiency and discipline in the workplace did not outweigh society's First Amendment interest in protecting respondent's speech.

Held: Respondent's discharge violated her First Amendment right to freedom of expression. Pp. 383-392.

(a) The content, form, and context of respondent's statement, as revealed by the record, support the threshold conclusion that the statement constitutes speech on a matter of public concern. The statement was made in the course of a conversation addressing the policies of the President's administration, and came on the heels of a news bulletin regarding a matter of heightened public attention: an attempt on the President's life. Although a statement amounting to a threat to kill the President would not be protected by the First Amendment, the lower courts correctly concluded that respondent's remark could not properly be criminalized. Moreover, the inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. Pp. 384-387.

(b) Petitioners have not met their burden of demonstrating a state interest justifying respondent's discharge that outweighs her First Amendment rights, given the functions of the Constable's office, respondent's position therein, and the nature of her statement. Although that statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office. Nor was there any danger that respondent had discredited the office by making the statement in public. Her discharge was not based on any assessment that her remark demonstrated a character trait that made her unfit to perform her work, which involved no confidential or policymaking role. Furthermore, there was no danger that the statement would have a detrimental impact on her working relationship with the Constable, since their employment-related interaction was apparently negligible. Pp. 388–392.

786 F. 2d 1233, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 392. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 394.

Billy E. Lee argued the cause for petitioners. With him on the briefs was *Mike Driscoll.*

Glen D. Nager argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Lauber*, and *Leonard Schaitman*.

Lloyd N. Cutler argued the cause for respondent. With him on the brief were *William R. Richardson, Jr.*, *Bruce V. Griffiths*, *Alvin J. Bronstein*, and *David B. Goldstein.**

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether a clerical employee in a county Constable's office was properly discharged for re-

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**David Crump*, *Wayne W. Schmidt*, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

Robert H. Chanin and *Jeremiah A. Collins* filed a brief for the National Education Association as *amicus curiae* urging affirmance.

marking, after hearing of an attempt on the life of the President, "If they go for him again, I hope they get him."

I

On January 12, 1981, respondent Ardith McPherson was appointed a deputy in the office of the Constable of Harris County, Texas. The Constable is an elected official who functions as a law enforcement officer.[1] At the time of her appointment, McPherson, a black woman, was 19 years old and had attended college for a year, studying secretarial science. Her appointment was conditional for a 90-day probationary period.

Although McPherson's title was "deputy constable," this was the case only because all employees of the Constable's office, regardless of job function, were deputy constables. Tr. of Oral Arg. 5. She was not a commissioned peace officer, did not wear a uniform, and was not authorized to make arrests or permitted to carry a gun.[2] McPherson's duties were purely clerical. Her work station was a desk at which there was no telephone, in a room to which the public did not have ready access. Her job was to type data from court papers into a computer that maintained an automated record of the status of civil process in the county. Her training consisted of two days of instruction in the operation of her computer terminal.

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[1] While the Constable's office is a law enforcement agency, Constable Rankin testified that other law enforcement departments were charged with the day-to-day enforcement of criminal laws in the county, Tr. (Jan. 21, 1985), pp. 11, 27 (hereinafter Tr.), and that more than 80% of the budget of his office was devoted to service of civil process, service of process in juvenile delinquency cases, and execution of mental health warrants. *Id.*, at 15–17. The involvement of his office in criminal cases, he testified, was in large part limited to warrants in bad check cases. *Id.*, at 24 ("Most of our percentage is with civil papers and hot check warrants").

[2] In order to serve as a commissioned peace officer, as the Court of Appeals noted, a deputy would have to undergo a background check, a psychological examination, and over 300 hours of training in law enforcement. 786 F. 2d 1233, 1237 (CA5 1986). Constable Rankin testified that while his office had on occasion been asked to guard various dignitaries visiting Houston, Tr. 24, a deputy who was not a commissioned peace officer would never be assigned to such duty, *id.*, at 30. Nor would such a deputy even be assigned to serve process. *Id.*, at 32.

On March 30, 1981, McPherson and some fellow employees heard on an office radio that there had been an attempt to assassinate the President of the United States. Upon hearing that report, McPherson engaged a co-worker, Lawrence Jackson, who was apparently her boyfriend, in a brief conversation, which according to McPherson's uncontroverted testimony went as follows:

> "Q: What did you say?
>
> "A: I said I felt that that would happen sooner or later.
>
> "Q: Okay. And what did Lawrence say?
>
> "A: Lawrence said, yeah, agreeing with me.
>
> "Q: Okay. Now, when you—after Lawrence spoke, then what was your next comment?
>
> "A: Well, we were talking—it's a wonder why they did that. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use medicaid, and at the time, I was thinking that's what it was.
>
> ". . . But then after I said that, and then Lawrence said, yeah, he's cutting back medicaid and food stamps. And I said, yeah, welfare and CETA. I said, shoot, if they go for him again, I hope they get him."[3]

McPherson's last remark was overheard by another Deputy Constable, who, unbeknownst to McPherson, was in the room at the time. The remark was reported to Constable Rankin, who summoned McPherson. McPherson readily admitted that she had made the statement, but testified that she told Rankin, upon being asked if she made the statement, "Yes, but I didn't mean anything by it." App. 38.[4] After their discussion, Rankin fired McPherson.[5]

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[3] Tr. 73. In its first order in this case, the District Court found that McPherson's statement had been, "'I hope if they go for him again, they get him.'" Civ. Action No. H–81–1442 (Apr. 15, 1983). In its second decision, the District Court made no explicit finding as to what was said. McPherson's testimony, as reproduced in the text, is only slightly different from the District Court's version, and the distinction is not significant.

McPherson brought suit in the United States District Court for the Southern District of Texas under 42 U. S. C. § 1983, alleging that petitioner Rankin, in discharging her, had violated her constitutional rights under color of state law. She sought reinstatement, backpay, costs and fees, and other equitable relief. The District Court held a hearing, and then granted summary judgment to Constable Rankin, holding that McPherson's speech had been unprotected and that her discharge had therefore been proper. Civ. Action No. H–81–1442 (Apr. 15, 1983).[6] The Court of Appeals for the Fifth Circuit vacated and remanded for trial, 736 F. 2d 175 (1984), on the ground that substantial issues of material fact regarding the context in which the statement had been made precluded the entry of summary judgment. *Id.*, at 180.

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[4] Rankin testified that, when he asked McPherson whether she meant the remark, she replied, "I sure do." App. 38. In neither of its opinions in this case did the District Court make an explicit finding regarding which version of this conflicting testimony it found credible. See also 736 F. 2d 175, 177, and n. 3 (CA5 1984).

We note that the question whether McPherson "meant" the statement is ambiguous. Assuming that McPherson told Rankin she "meant it," McPherson might think she had said that she "meant" that she disliked the President and would not mind if he were dead, while Rankin might believe that McPherson "meant" to indicate approval of, or in any event hope for, political assassination. This ambiguity makes evident the need for carefully conducted hearings and precise and complete findings of fact.

[5] McPherson evidently returned to the office the next day seeking an interview with the Constable, but Rankin refused to see her.

[6] Because the District Court entered summary judgment after the first hearing, we must conclude that it did not, in its April 15 ruling, resolve any disputed issues of material fact. We have considered the District Court's findings of fact made after this hearing only to the extent they address what appear to be undisputed factual issues.

On remand, the District Court held another hearing and ruled once again, this time from the bench, that the statements were not protected speech. App. 120. Again, the Court of Appeals reversed. 786 F. 2d 1233 (1986). It held that McPherson's remark had addressed a matter of public concern, requiring that society's interest in McPherson's freedom of speech be weighed against her employer's interest in maintaining efficiency and discipline in the workplace. *Id.*, at 1236. Performing that balancing, the Court of Appeals concluded that the Government's interest did not outweigh the First Amendment interest in protecting McPherson's speech. Given the nature of McPherson's job and the fact that she was not a law enforcement officer, was not brought by virtue of her job into contact with the public, and did not have access to sensitive information, the Court of Appeals deemed her "duties . . . so utterly ministerial and her potential for undermining the office's mission so trivial" as to forbid her dismissal for expression of her political opinions. *Id.*, at 1239. "However ill-considered Ardith McPherson's opinion was," the Court of Appeals concluded, "it did not make her unfit" for the job she held in Constable Rankin's office. *Ibid.* The Court of Appeals remanded the case for determination of an appropriate remedy.

We granted certiorari, 479 U. S. 913 (1986), and now affirm.

II

It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech. *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression. See *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274, 284–285 (1977); *Perry* v. *Sindermann*, *supra*, at 597–598.

The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968); *Connick* v. *Myers*, 461 U. S. 138, 140 (1983). This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, *supra*, at 574. Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

A

The threshold question in applying this balancing test is whether McPherson's speech may be "fairly characterized as constituting speech on a matter of public concern." *Connick*, 461 U. S., at 146.[7] "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.*, at 147–148. The District Court apparently found that McPherson's speech did not address a matter of public concern.[8] The Court of Appeals rejected this conclusion, finding that "the life and death of the President are obviously matters of public concern." 786 F. 2d, at 1236. Our view of these determinations of the courts below is limited in this context by our constitutional obligation to assure that the record supports this conclusion: "'[W]e are compelled to examine for ourselves the statements in issue and the circumstances under which they [were] made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'" *Connick*, *supra*, at 150, n. 10, quoting *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946) (footnote omitted).[9]

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[7] Even where a public employee's speech does not touch upon a matter of public concern, that speech is not "totally beyond the protection of the First Amendment," *Connick* v. *Myers*, 461 U. S., at 147, but "absent the most unusual circumstances a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Ibid.*

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[8] The District Court, after its second hearing in this case, delivered its opinion from the bench and did not explicitly address the elements of the required balancing test. It did, however, state that the case was "not like the *Myers* case where Ms. Myers was trying to comment upon the internal affairs of the office, or matters upon public concern. I don't think it is a matter of public concern to approve even more to *[sic]* the second attempt at assassination." App. 119.

The dissent accuses us of distorting and beclouding the record, evidently because we have failed to accord adequate deference to the purported "findings" of the District Court. *Post*, at 396. We find the District Court's "findings" from the bench significantly more ambiguous than does the dissent:

"Then I suppose we get down to the serious question, what did she 'mean.' I don't believe she meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context. This is not the situation where one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

"It's not like the *Myers* case where Ms. Myers was trying to comment upon the internal affairs of the office, or matters upon public concern. I don't think it is a matter of public concern to *[sic]* approve even more to the second attempt at assassination." App. 119.

The District Court's sole affirmative "finding" here, that McPherson's statement constituted "violent words, in context," is unintelligible in First Amendment terms. Even assuming that the District Court can be viewed to have made any findings of fact on the public concern issue, it is unclear to what extent that issue presents a question of fact at all. In addition, the dissent fails to acknowledge that any factual findings subsumed in the "public concern" determination are subject to constitutional fact review. See also 786 F. 2d, at 1237.

Considering the statement in context, as *Connick* requires, discloses that it plainly dealt with a matter of public concern. The statement was made in the course of a conversation addressing the policies of the President's administration.[10] It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President.[11] While a statement that amounted to a threat to kill the President would not be protected by the First Amendment, the District Court concluded, and we agree, that McPherson's statement did not amount to a threat punishable under 18 U. S. C. § 871(a) or 18 U. S. C. § 2385, or, indeed, that could properly be criminalized at all. See 786 F. 2d, at 1235 ("A state would . . . face considerable constitutional obstacles if it sought to criminalize the words that were uttered by McPherson on the day the President was shot"); see also Brief for United States as *Amicus Curiae* 8 ("[W]e do not think that respondent's remark could be criminalized"); cf. *Watts* v. *United States*, 394 U. S. 705 (1969) *(per curiam)*.[12] The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. "[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); see also *Bond* v. *Floyd*, 385 U. S. 116, 136 (1966): "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected."

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[9] See also *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression,'" quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 284–286 (1964)). The ultimate issue—whether the speech is protected—is a question of law. *Connick*, *supra*, at 148, n. 7.

[10] McPherson actually made the statement at issue not once, but twice, and only in the first instance did she make the statement in the context of a discussion of the President's policies. McPherson repeated the statement to Constable Rankin at his request. We do not consider the second statement independently of the first, however. Having been required by the Constable to repeat her statement, McPherson might well have been deemed insubordinate had she refused. A public employer may not divorce a statement made by an employee from its context by requiring the employee to repeat the statement, and use that statement standing alone as the basis for a discharge. Such a tactic could in some cases merely give the employee the choice of being fired for failing to follow orders or for making a statement which, out of context, may not warrant the same level of First Amendment protection it merited when originally made.

[11] The private nature of the statement does not, contrary to the suggestion of the United States, Brief for United States as *Amicus Curiae* 18,

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vitiate the status of the statement as addressing a matter of public concern. See *Givhan* v. *Western Line Consolidated School Dist.*, 439 U. S. 410, 414–416 (1979).

[12] Constable Rankin was evidently unsure of this; he testified that he called the Secret Service to report the incident and suggest that they investigate McPherson. Tr. 44. McPherson testified that the Secret Service did, in fact, come to her home:

"Oh, they told me that they thought it was a prank call, but . . . they have to investigate any call that they get.

* * * * *

". . . When they left, they told my mama and me that they were sorry. They said that they knew it was a prank call, they just have to come out and investigate. They said that's the procedure." *Id.*, at 81–82.

B

Because McPherson's statement addressed a matter of public concern, *Pickering* next requires that we balance McPherson's interest in making her statement against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568.[13] The State bears a burden of justifying the discharge on legitimate grounds. *Connick*, 461 U. S., at 150.

In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. See *id.*, at 152–153; *Givhan* v. *Western Line Consolidated School Dist.*, 439 U. S. 410, 415, n. 4 (1979). We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. *Pickering*, 391 U. S., at 570–573.

These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest. From this perspective, however, petitioners fail to demonstrate a state interest that outweighs McPherson's First Amendment rights. While

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[13] We agree with JUSTICE POWELL that a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee. *Post*, at 393. To the extent petitioners' claim that McPherson's speech rendered her an unsuitable employee for a law enforcement agency implicates a serious state interest and necessitates the application of the balancing element of the *Pickering* analysis, we proceed to that task.

McPherson's statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office. The Constable was evidently not afraid that McPherson had disturbed or interrupted other employees—he did not inquire to whom respondent had made the remark and testified that he "was not concerned who she had made it to," Tr. 42. In fact, Constable Rankin testified that the possibility of interference with the functions of the Constable's office had *not* been a consideration in his discharge of respondent and that he did not even inquire whether the remark had disrupted the work of the office.[14]

Nor was there any danger that McPherson had discredited the office by making her statement in public. McPherson's speech took place in an area to which there was ordinarily no public access; her remark was evidently made in a private conversation with another employee. There is no suggestion that any member of the general public was present or heard McPherson's statement. Nor is there any evidence that employees other than Jackson who worked in the room even heard the remark. Not only was McPherson's discharge unrelated to the functioning of the office, it was not based on any assessment by the Constable that the remark demonstrated a character trait that made respondent unfit to perform her work.[15]

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[14] He testified: "I did not base my action on whether the work was interrupted or not. I based my action on a statement that was made to me direct." Tr. 45.

[15] In response to a question from the bench, counsel at oral argument before this Court expressly denied that this was the motive for the Constable's discharge of McPherson:

"QUESTION: . . . [S]uppose when she was called in by the constable and asked whether she had said that, she said, 'Yes, I said it.'

"MR. LEE [counsel for petitioners]: She was, Your Honor. She was called in by the constable.

"QUESTION: I know. Now, suppose she had said, 'Yeah, I said it, but, you know, I didn't really mean anything by it.'

[Footnote 15 is continued on p. 390]

While the facts underlying Rankin's discharge of McPherson are, despite extensive proceedings in the District Court, still somewhat unclear,[16] it is undisputed that he fired McPherson based on the *content* of her speech. Evidently because McPherson had made the statement, and because the Constable believed that she "meant it," he decided that she was not a suitable employee to have in a law enforcement agency. But in weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public

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"MR. LEE: Yes, sir.

"QUESTION: Do we know whether she would have been fired? I mean, conceivably you might fire her anyway. I mean, he might have said, 'Well, you know, you shouldn't talk like that, whether you mean it or not. I don't want that kind of talk in my law enforcement agency, whether you mean it or not. It shows poor judgment, and you're fired.'

"Was that the basis for his dismissal?

"MR. LEE: Your Honor, I would say not, based upon two trials that we have been through in the District Court." Tr. of Oral Arg. 10–11.

[16] Rankin's assertion, as evidently credited by the District Court after its first hearing, was that he discharged respondent because her statement undermined his "confidence" in her. App. 42–43. After its second hearing, the District Court did not state clearly what it concluded the motive for respondent's discharge to be. Petitioners' counsel, at oral argument, suggested that McPherson was discharged because she hoped that the President would be assassinated. Tr. of Oral Arg. 11–13. The Court of Appeals similarly classified the District Court's finding. See 786 F. 2d, at 1237 ("For the purpose of applying the *Pickering/Connick* balancing test, we accept the district court's conclusion that McPherson actually hoped that the President would be assassinated"). We are not persuaded that the Court of Appeals has properly divined the meaning of the District Court's findings, but, even accepting the Court of Appeals' view, we agree with the Court of Appeals that the speech was protected.

contact role, the danger to the agency's successful functioning from that employee's private speech is minimal. We cannot believe that every employee in Constable Rankin's office, whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency.[17] At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee.[18]

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[17] We therefore reject the notion, expressed by petitioners' counsel at oral argument, that the fact that an employee was deputized meant, regardless of that employee's job responsibility, that the Constable could discharge the employee for any expression inconsistent with the goals of a law enforcement agency.

"MR. LEE [counsel for petitioners]: The man who sweeps the floor in the constable's office is not employed by the constable. He's employed by commissioners' court who takes care of all of the courthouses." Tr. of Oral Arg. 6.

"QUESTION: I guess it's a lucky thing then that the constable is not himself responsible for keeping the courthouse clean, which could have been the case. I mean, you—

"MR. LEE: Which could have been the case, yes, sir. That is right, because he would then—

"QUESTION: Then your argument would indeed extend to the man who swept the floor; right?

. . . . .

"QUESTION: And you would be making the same argument here—

"MR. LEE: Yes, sir.

"QUESTION: —because that man had the name of deputy?

"MR. LEE: That's right." *Id.*, at 8.

[18] This is not to say that clerical employees are insulated from discharge where their speech, taking the acknowledged factors into account, truly injures the public interest in the effective functioning of the public employer. Cf. *McMullen* v. *Carson*, 754 F. 2d 936 (CA11 1985) (clerical employee in sheriff's office properly discharged for stating on television news that he was an employee for the sheriff's office and a recruiter for the Ku Klux Klan).

This is such a case. McPherson's employment-related interaction with the Constable was apparently negligible. Her duties were purely clerical and were limited solely to the civil process function of the Constable's office. There is no indication that she would ever be in a position to further—or indeed to have any involvement with—the minimal law enforcement activity engaged in by the Constable's office. Given the function of the agency, McPherson's position in the office, and the nature of her statement, we are not persuaded that Rankin's interest in discharging her outweighed her rights under the First Amendment.

Because we agree with the Court of Appeals that McPherson's discharge was improper, the judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, concurring.

It is not easy to understand how this case has assumed constitutional dimensions and reached the Supreme Court of the United States. The fact that the case is here, however, illustrates the uniqueness of our Constitution and our system of judicial review: courts at all levels are available and receptive to claims of injustice, large and small, by any and every citizen of this country.

As the Court notes, at the time this dispute arose respondent McPherson was a 19-year-old probationary employee in the Constable's office in Harris County, Texas. Her only job was to type information from court papers into a computer. She had no law enforcement responsibility, nor was she permitted to perform the primary task of the Constable's office, serving civil process. While she was seated at her desk, the office radio announced the shocking news that someone had tried to assassinate the President. Reacting to the report, McPherson engaged in a brief conversation with her co-worker, at the end of which she said: "[I]f they go for him again, I hope they get him." Tr. (Jan. 21, 1985), p. 73. This unfortunate remark was overheard by another employee, who relayed it to the Constable. McPherson immediately was summoned to the Constable's office, where she freely admitted having made the statement. Based on this single comment, McPherson was summarily discharged.

There is no dispute that McPherson's comment was made during a private conversation with a co-worker who happened also to be her boyfriend. She had no intention or expectation that it would be overheard or acted on by others. Given this, I think it is unnecessary to engage in the extensive analysis normally required by *Connick* v. *Myers*, 461 U. S. 138 (1983), and *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). If a statement is on a matter of public concern, as it was here, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful.* To the extent that the full constitutional analysis of the competing interests is required, I generally agree with the Court's opinion.

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*I recognize, and strongly agree, that a public employer, no less than his private-sector counterpart, must have authority to maintain the efficiency as well as the integrity of his office. As the Court notes, "'the State, as an employer, [has an interest] in promoting the efficiency of the public services it performs through its employees.'" *Ante*, at 384 (quoting *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968), and *Connick* v. *Myers*, 461 U. S. 138, 140 (1983)). I do not read the Court's opinion as extending the *Connick/Pickering* test, or otherwise making it more difficult for employers to discipline workers whose speech interferes with these goals. Cf. *Arnett* v. *Kennedy*, 416 U. S. 134, 168 (1974) (POWELL, J., concurring in part and concurring in result in part) ("[T]he Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial") (footnote omitted). In this case, however, there is no objective evidence that McPherson's lone comment had any negative effect on the morale or efficiency of the Constable's office. See *ante*, at 388–389.

In my view, however, the case is hardly as complex as might be expected in a dispute that now has been considered five separate times by three different federal courts. The undisputed evidence shows that McPherson made an ill-considered—but protected—comment during a private conversation, and the Constable made an instinctive, but intemperate, employment decision on the basis of this speech. I agree that on these facts, McPherson's private speech is protected by the First Amendment.

I join the opinion of the Court.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

I agree with the proposition, felicitously put by Constable Rankin's counsel, that no law enforcement agency is required by the First Amendment to permit one of its employees to "ride with the cops and cheer for the robbers." App. 94. The issue in this case is whether Constable Rankin, a law enforcement official, is prohibited by the First Amendment from preventing his employees from saying of the attempted assassination of President Reagan—on the job and within hearing of other employees—"If they go for him again, I hope they get him." The Court, applying the two-prong analysis of *Connick* v. *Myers*, 461 U. S. 138 (1983), holds that McPherson's statement was protected by the First Amendment because (1) it "addressed a matter of public concern," and (2) McPherson's interest in making the statement outweighs Rankin's interest in suppressing it. In so doing, the Court significantly and irrationally expands the definition of "public concern"; it also carves out a new and very large class of employees—*i. e.*, those in "nonpolicymaking" positions—who, if today's decision is to be believed, can never be disciplined for statements that fall within the Court's expanded definition. Because I believe the Court's conclusions rest upon a distortion of both the record and the Court's prior decisions, I dissent.

I

To appreciate fully why the majority errs in reaching its first conclusion, it is necessary to recall the origins and purposes of *Connick*'s "public concern" requirement. The Court long ago rejected Justice Holmes' approach to the free speech rights of public employees, that "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517 (1892). We have, however, recognized that the government's power as an employer to make hiring and firing decisions on the basis of what its employees and prospective employees say has a much greater scope than its power to regulate expression by the general public. See, *e. g.*, *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968).

Specifically, we have held that the First Amendment's protection against adverse personnel decisions extends only to speech on matters of "public concern," *Connick*, *supra*, at 147–149, which we have variously described as those matters dealing in some way with "the essence of self-government," *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), matters as to which "free and open debate is vital to informed decisionmaking by the electorate," *Pickering*, *supra*, at 571–572, and matters as to which "'debate . . . [must] be uninhibited, robust, and wide-open,'" *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 755 (1985) (plurality opinion) (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)). In short, speech on matters of public concern is that speech which lies "at the heart of the First Amendment's protection," *First Nat. Bank* v. *Bellotti*, 435 U. S. 765, 776 (1978). If, but only if, an employee's speech falls within this category, a public employer seeking to abridge or punish it must show that the employee's interest is outweighed by the government's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, *supra*, at 568.

McPherson fails this threshold requirement. The statement for which she was fired—and the only statement reported to the Constable—was, "If they go for him again, I hope they get him." It is important to bear in mind the District Judge's finding that this was *not* hyperbole. The Court's opinion not only does not clarify that point, but beclouds it by a footnote observing that the District Judge did not explicitly resolve the conflict in testimony as to whether McPherson told the Constable that she "meant" what she had said. *Ante*, at 382, n. 4. He did not. But he assuredly found that, whether McPherson later said she meant it or not, and whether she even meant it at the time or not, the idea she expressed was not just an exaggerated expression of her disapproval for the President's policies, but a voicing of the hope that, next time, the President would be killed. The District Judge rejected McPherson's argument that her statement was "mere political hyperbole," finding, to the contrary, that it was, "in context," "violent words." 786 F. 2d 1233, 1235 (CA5 1986). "This is not," he said, "the situation where one makes an idle threat to kill someone for not picking them *[sic]* up on time, or not picking up their *[sic]* clothes. It was more than that." *Ibid.* He ruled against McPherson at the conclusion of the second hearing because "I don't think it is a matter of public concern to approve even more to *[sic]* the second attempt at assassination." App. 119. The Court's opinion does not attempt to set aside this finding as to the import of the statement, and there is indeed no basis for doing so, since it is entirely reasonable and supported by the evidence.

Given the meaning of the remark, there is no basis for the Court's suggestion, *ante*, at 386–387, that McPherson's criticisms of the President's policies that immediately preceded the remark can illuminate it in such fashion as to render it constitutionally protected. Those criticisms merely reveal the speaker's *motive* for expressing the desire that the next attempt on the President's life succeed, in the same way that a political assassin's remarks to his victim before pulling the trigger might reveal a motive for that crime. The majority's magical transformation of the *motive* for McPherson's statement into its *content* is as misguided as viewing a political assassination preceded by a harangue as nothing more than a strong denunciation of the victim's political views.

That McPherson's statement does not constitute speech on a matter of "public concern" is demonstrated by comparing it with statements that have been found to fit that description in prior decisions involving public employees. McPherson's statement is a far cry from the question by the Assistant District Attorney in *Connick* whether her co-workers "ever [felt] pressured to work in political campaigns," *Connick*, 461 U. S., at 149; from the letter written by the public school teacher in *Pickering* criticizing the Board of Education's proposals for financing school construction, *Pickering*, *supra*, at 566; from the legislative testimony of a state college teacher in *Perry* v. *Sindermann*, 408 U. S. 593, 595 (1972), advocating that a particular college be elevated to 4-year status; from the memorandum given by a teacher to a radio station in *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 282 (1977), dealing with teacher dress and appearance; and from the complaints about school board policies and practices at issue in *Givhan* v. *Western Line Consolidated School Dist.*, 439 U. S. 410, 413 (1979). See *Connick*, *supra*, at 145–146.

McPherson's statement is indeed so different from those that it is only one step removed from statements that we have previously held entitled to no First Amendment protection even in the nonemployment context—including assassination threats against the President (which are illegal under 18 U. S. C. §871), see *Frohwerk* v. *United States*, 249 U. S. 204, 206 (1919); "'fighting' words," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942); epithets or personal abuse, *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310 (1940); and advocacy of force or violence, *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952). A statement lying so near the category of completely unprotected speech cannot fairly be viewed as lying within the "heart" of the First Amendment's protection; it lies within that category of speech that can neither be characterized as speech on matters of public concern nor properly subject to criminal penalties, see *Connick*, *supra*, at 147. Once McPherson stopped explicitly criticizing the President's policies and expressed a desire that he be assassinated, she crossed the line.

The Court reaches the opposite conclusion only by distorting the concept of "public concern." It does not *explain* how a statement expressing approval of a serious and violent crime—assassination of the President—can possibly fall within that category. It simply rehearses the "context" of McPherson's statement, which as we have already seen is irrelevant here, and then concludes that because of that context, and because the statement "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President," the statement "plainly dealt with a matter of public concern." *Ante*, at 386. I cannot respond to this progression of reasoning except to say I do not understand it. Surely the Court does not mean to adopt the reasoning of the court below, which was that McPherson's statement was "addressed to a matter of public concern" within the meaning of *Connick* because the public would obviously be "concerned" about the assassination of the President. That is obviously untenable: The public would be "concerned" about a statement threatening to blow up the local federal building or demanding a $1 million extortion payment, yet that kind of "public concern" does not entitle such a statement to any First Amendment protection at all.

II

Even if I agreed that McPherson's statement was speech on a matter of "public concern," I would still find it unprotected. It is important to be clear on what the issue is in this part of the case. It is not, as the Court suggests, whether "Rankin's interest *in discharging [McPherson]* outweighed her rights under the First Amendment." *Ante*, at 392 (emphasis added). Rather, it is whether his interest *in preventing the expression of such statements in his agency* outweighed her First Amendment interest in making the statement. We are not deliberating, in other words, (or at least should not be) about whether the sanction of dismissal was, as the concurrence puts it, "an . . . intemperat[e] employment decision." It may well have been—and personally I think it was. But we are not sitting as a panel to develop sound principles of proportionality for adverse actions in the state civil service. We are asked to determine whether, given the interests of this law enforcement office, McPherson had a *right* to say what she did—so that she could not only not be fired for it, but could not be formally reprimanded for it, or even prevented from repeating it endlessly into the future. It boggles the mind to think that she has such a right.

The Constable testified that he "was very concerned that this remark was made." App. 81. Rightly so. As a law enforcement officer, the Constable obviously has a strong interest in preventing statements by any of his employees approving, or expressing a desire for, serious, violent crimes—regardless of whether the statements actually interfere with office operations at the time they are made or demonstrate character traits that make the speaker unsuitable for law enforcement work. In *Connick*, we upheld the dismissal of an Assistant District Attorney for circulating among her coworkers a questionnaire implicitly criticizing her superiors. Although we held that one of the questions—dealing with pressure in the office to participate in political campaigns—satisfied the "public concern" requirement, we held that the discharge nonetheless did not violate the First Amendment because the questionnaire itself "carrie[d] the clear potential for undermining office relations." *Connick*, *supra*, at 152. Statements like McPherson's obviously carry a similar potential in an office devoted to law enforcement. Although that proposition is in my view evident on its face, we have actual evidence of it in the present record: The only reason McPherson's remark was brought to the Constable's attention was that one of his deputies, Captain Levrier, had overheard the remark and, according to the Constable, "was very upset because of [it]." App. 80.*

Statements by the Constable's employees to the effect that "if they go for the President again, I hope they get him" might also, to put it mildly, undermine public confidence in the Constable's office. A public employer has a strong interest in preserving its reputation with the public. See, *e. g.*, *Snepp* v. *United States*, 444 U. S. 507, 509, n. 3 (1980); *CSC* v. *Letter Carriers*, 413 U. S. 548, 564–565 (1973). We know—from undisputed testimony—that McPherson had or might have had some occasion to deal with the public while carrying out her duties. See App. 73 (answering telephone inquiries); *id.*, at 78–79 (personal assistance).

The Court's sweeping assertion (and apparent holding) that where an employee "serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal," *ante*, at 390–391, is simply contrary to reason and experience. Nonpolicymaking employees (the Assistant District Attorney in *Connick*, for example) can hurt working relationships and undermine public confidence in an organization every bit as much as policymaking employees. I, for one, do not look forward to the new First Amendment world the Court creates, in which nonpolicymaking employees of the Equal Employment Opportunity Commission must

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*The majority errs in asserting that "Constable Rankin testified that the possibility of interference with the functions of the Constable's office had *not* been a consideration in his discharge of respondent." *Ante*, at 389. In fact, the statement on which the majority relies for that proposition merely affirms that the Constable did not base his decision "'on whether the work was interrupted or not.'" See *ante*, at 389, n. 14, quoting Tr. (Jan. 21, 1985), p. 45. That says nothing about his perceptions of the effect of such statements upon office morale and efficiency.

be permitted to make remarks on the job approving of racial discrimination, nonpolicymaking employees of the Selective Service System to advocate noncompliance with the draft laws, and (since it is really quite difficult to contemplate anything more absurd than the present case itself), nonpolicymaking constable's deputies to express approval for the assassination of the President.

In sum, since Constable Rankin's interest in maintaining both an esprit de corps and a public image consistent with his office's law enforcement duties outweighs any interest his employees may have in expressing on the job a desire that the President be killed, even assuming that such an expression addresses a matter of public concern it is not protected by the First Amendment from suppression. I emphasize once again that that is the issue here—and *not*, as both the Court's opinion and especially the concurrence seem to assume, whether the means used to effect suppression (viz., firing) were excessive. The First Amendment contains no "narrow tailoring" requirement that speech the government is entitled to suppress must be suppressed by the mildest means possible. If Constable Rankin was entitled (as I think any reasonable person would say he was) to admonish McPherson for saying what she did on the job, within hearing of her co-workers, and to warn her that if she did it again a formal censure would be placed in her personnel file, then it follows that he is entitled to rule that particular speech out of bounds in that particular work environment—and that is the end of the First Amendment analysis. The "intemperate" manner of the permissible suppression is an issue for another forum, or at least for a more plausibly relevant provision of the Constitution.

Because the statement at issue here did not address a matter of public concern, and because, even if it did, a law enforcement agency has adequate reason not to permit such expression, I would reverse the judgment of the court below.

BUCHANAN *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 85–5348. Argued January 12, 1987—Decided June 24, 1987

Petitioner was tried with a codefendant for murder and related crimes. The trial court dismissed the capital portion of petitioner's indictment. It also denied his motions in which he requested that the jury not be "death qualified," and that there be two juries, one for guilt and the other for sentencing, with the first not being "death qualified." "Death qualification" occurs when prospective jurors are excluded for cause in light of their stated inability to set aside their strong opposition to the death penalty. At trial, petitioner attempted to establish the affirmative defense of "extreme emotional disturbance" by having a social worker read from several psychological evaluations that were made following a previous arrest. On cross-examination, the prosecutor attempted to rebut this defense by having the social worker read from another evaluation prepared by Dr. Robert J. G. Lange on the joint motion of the prosecution and counsel for petitioner following his murder arrest. As read to the jury, the report set forth Dr. Lange's general observations about petitioner's mental state but did not describe any statements petitioner made about the crimes with which he was charged. After finding both defendants guilty, the jury imposed the maximum possible sentence on petitioner and sentenced his codefendant to death. The Supreme Court of Kentucky affirmed petitioner's conviction, holding that the jury's "death qualification" did not deprive petitioner of his right to an impartial jury drawn from a fair cross section of the community, and that the trial judge had not erred in allowing the introduction of Dr. Lange's report. The court ruled that petitioner had opened the door for the introduction of the report by his introducing earlier reports that were beneficial to him, and that the use of Dr. Lange's report did not violate petitioner's rights under *Estelle* v. *Smith*, 451 U. S. 454.

Held:

1. Petitioner was not deprived of his Sixth Amendment right to an impartial jury, representative of a fair cross section of the community, because the prosecution was permitted to "death-qualify" the jury. *Lockhart* v. *McCree*, 476 U. S. 162, which authorizes "death qualification" prior to the guilt phase of a bifurcated capital trial, controls this case involving a joint trial in which the death penalty was sought only against petitioner's codefendant. The Commonwealth had legitimate interests in holding a joint trial where the defendants' conduct arose from

the same events, and in having a jury that could properly find the facts and apply the law at both phases of the trial as to both defendants, and assess the appropriateness of the death penalty for the codefendant. Pp. 415–421.

2. The prosecution's use of Dr. Lange's report solely to rebut petitioner's psychological evidence did not violate petitioner's Fifth and Sixth Amendment rights under *Smith*. Where, as here, a defendant requests a psychological evaluation or presents psychiatric evidence, the prosecution may rebut this presentation with the report of the requested examination without implicating the defendant's privilege against self-incrimination. Because petitioner did not testify and his entire strategy was to establish his "mental status" defense through the social worker's readings of earlier evaluations, the prosecution could not respond to petitioner's case unless it presented other psychological evidence. Moreover, the use of Dr. Lange's report did not deny petitioner his right to the effective assistance of counsel. Unlike the situation in *Smith*, petitioner's counsel himself requested Dr. Lange's evaluation and presumably discussed it with his client. Petitioner's argument that neither he nor his counsel could anticipate the report's use to rebut his "mental status" defense is unavailing. *Smith* put counsel on notice that, if he intended to present such a defense, he could anticipate the use of psychological evidence in rebuttal. Pp. 421–425.

691 S. W. 2d 210, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in Part I of which STEVENS, J., joined, *post*, p. 426.

Kevin M. McNally, by appointment of the Court, 479 U. S. 1015, argued the cause for petitioner. With him on the briefs were *C. Thomas Hectus* and *M. Gail Robinson*.

David A. Smith, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the briefs were *David L. Armstrong*, Attorney General, *C. Lloyd Vest II*, Assistant Attorney General, and *Ernest A. Jasmin*, Special Assistant Attorney General.*

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*A brief of *amici curiae* urging affirmance was filed for the State of Arkansas et al. by *Michael C. Turpen*, Attorney General of Oklahoma, *David W. Lee* and *Susan Stewart Dickerson*, Assistant Attorneys General, *John Steven Clark*, Attorney General of Arkansas, *John J. Kelly*, Chief

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents two narrow issues arising out of petitioner Buchanan's trial for murder. First, it poses the question whether petitioner was deprived of his right to an impartial jury, representative of a fair cross section of the community, because the Commonwealth of Kentucky was permitted to "death-qualify" the jury in his joint trial where the death penalty was sought against his codefendant. Second, the case raises the question whether the admission of findings from a psychiatric examination of petitioner proffered solely to rebut other psychological evidence presented by petitioner violated his Fifth and Sixth Amendment rights where his counsel had requested the examination and where petitioner attempted to establish at trial a mental-status defense.[1]

State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Jim C. Smith*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *C. William Ullrich*, Acting Attorney General of Guam, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *Edward Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Robert M. Spire*, Attorney General of Nebraska, *Lacy H. Thornburg*, Attorney General of North Carolina, *Dave Frohnmayer*, Attorney General of Oregon, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *Mary Sue Terry*, Attorney General of Virginia, and *Kenneth O. Eikenberry*, Attorney General of Washington.

[1] In his brief, petitioner advances three additional claims: (1) an alleged violation of the First Amendment rights of the jurors not selected for his jury; (2) an alleged equal protection violation with respect to those jurors; and (3) a challenge to the actual "death-qualification" procedure used in this case. Brief for Petitioner 32–39. These claims were not properly presented to the Supreme Court of Kentucky, were not addressed by it, and were not included as questions in the petition for certiorari. See this Court's Rule 21.1(a). We therefore need not, and do not, reach these claims. See *Hill* v. *California*, 401 U. S. 797, 805–806 (1971); *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969).

I

Shortly after midnight on January 7, 1981, police in Louisville, Ky., discovered the partially clad body of 20-year-old Barbel C. Poore in the backseat of her automobile. The young woman had been sexually assaulted and shot twice in the head. The discovery was occasioned by a report to the police from Poore's mother, who had driven by the gas station where her daughter worked, after Poore failed to return home at the expected time, and who found the station unattended and unlocked. Tr. 399 (Aug. 2–13, 1982). The ensuing police investigation led to the arrest of Kevin Stanford, Troy Johnson, and petitioner, David Buchanan, a juvenile.

From the confessions of these participants, including that of petitioner, the events surrounding the murder were reconstructed: Petitioner first approached Johnson with a plan to rob the gas station, and obtained from him a gun and bullets owned by Johnson's brother. *Id.*, at 1031. Petitioner then telephoned Stanford, who lived in an apartment complex next to the station, and proposed the plan to him. *Id.*, at 1032. Johnson and petitioner proceeded to the parking lot of the apartment complex where they met Stanford. Petitioner told Johnson to wait in the car while he and Stanford approached the station. *Id.*, at 484, 1033. Petitioner and Stanford entered the station office, with Stanford carrying the gun. While petitioner attempted to locate and then to open the safe, Stanford took Poore into the interior restroom and raped her. *Id.*, at 484–485. After petitioner failed to open the safe, he joined Stanford and the two took turns raping and sodomizing Poore despite her plea to petitioner that the assault cease. *Id.*, at 485, 1044.

Approximately a half hour after leaving Johnson, petitioner returned to the car carrying a can of gasoline which he placed in its backseat. After telling Johnson to continue to wait, *id.*, at 1034, petitioner left for the station. He came back to the car once again, entered it, and ordered

Johnson to drive to a location, a short distance from the station, where Stanford had driven Poore in Poore's car in order, as petitioner put it, "[t]o have some more sex with her." *Id.*, at 1037. Petitioner got out of Johnson's car and approached Stanford, who was standing beside the driver's side of Poore's vehicle. *Ibid.* As petitioner watched, Stanford shot Poore in the face and then, as petitioner started to return to Johnson's car, in the back of the head. *Id.*, at 486, 1037–1038.

While Johnson was held over in juvenile court,[2] petitioner and Stanford were transferred to the Circuit Court of Jefferson County and were indicted for capital murder and other charges arising out of events surrounding the murder.[3] The Commonwealth proceeded to try petitioner and Stanford jointly.[4] Petitioner did not request that his trial be severed from Stanford's.[5] In two pretrial motions, he did request that the jury not be "death qualified,"[6] and that there be two juries, one for guilt and the other for sentencing, with the first not being "death qualified." App. 5, 8. In essence, he argued that the "death qualification" of the jury prior to the guilt phase violated his right to an impartial jury drawn from a fair cross section of the community in violation of the Sixth and Fourteenth Amendments. *Id.*, at 6, 9. The court denied both motions. Petitioner filed another pretrial motion seeking dismissal of the capital portion of the indictment against him on the basis that Stanford had been the triggerman, that petitioner had no intent to kill Poore, and that therefore, under *Enmund* v. *Florida*, 458 U. S. 782 (1982),[7] petitioner could not be sentenced to death. App. 19, 22. Without opinion and with no objection from the prosecution, the court granted this motion. *Id.*, at 24. At *voir dire*, petitioner renewed his earlier motions as to "death qualification," emphasizing that he was no longer subject to the death penalty. *Id.*, at 26–27. The court again denied these motions.

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[2] In juvenile court Johnson pleaded guilty to accomplice liability, Tr. 1029 (Aug. 2–13, 1982), in exchange for becoming a witness for the Commonwealth.

[3] The applicable Kentucky murder statute at the time of petitioner's trial provided:

"(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

(2) Murder is a capital offense." Ky. Rev. Stat. § 507.020 (Supp. 1977).

Subparagraph (b) was amended in 1984 in a minor particular having no application to petitioner. See 1984 Ky. Acts, ch. 165, § 26, effective July 13, 1984.

Petitioner and Stanford were both charged with murder, first-degree robbery, and sodomy. In addition, Stanford was charged with receiving stolen property, and petitioner with rape and kidnaping. App. 2.

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[4] Kentucky Rules of Criminal Procedure (1986) provide for the joinder of offenses and defendants at trial. Rule 9.12 states in pertinent part:

"The court may order two (2) or more indictments, informations, complaints or uniform citations to be tried together if the offenses, and the defendants, if more than one (1), could have been joined in a single indictment, information, complaint or uniform citation. The procedure shall be the same as if the prosecution were under a single indictment, information, complaint or uniform citation."

Rule 6.18, which deals with the joinder of offenses, provides:

"Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan."

Rule 6.20, concerning joinder of defendants, allows such joinder in the following situation:

"Two (2) or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

These Rules were applicable in this case.

[5] Rule 9.16 of the Kentucky Rules of Criminal Procedure permits a defendant to file a motion for severance on the ground that the joint trial might be unduly prejudicial. See *Commonwealth* v. *Rogers*, 698 S. W. 2d 839 (Ky. 1985). In Kentucky the trial judge has considerable discretion whether to permit the severance. *Wilson* v. *Commonwealth*, 695 S. W. 2d 854, 858 (Ky. 1985). Although Stanford moved for a severance, App. 26, petitioner apparently did not view this as beneficial to him and made no such request. See Tr. of Oral Arg. 27. At one point, the trial judge ruled that an objection by counsel for one defendant would be regarded as an objection by the counsel for the other, App. 28, but this ruling was made in the context of selecting a jury and after Stanford's motion for severance was denied.

[6] A "death-qualified" jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views

At trial, petitioner attempted to establish the affirmative defense of "extreme emotional disturbance."[8] He called as

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about the death penalty that "would 'prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath.'" *Wainwright* v. *Witt*, 469 U. S. 412, 424 (1985), quoting *Adams* v. *Texas*, 448 U. S. 38, 45 (1980). The prosecutor may remove such potential jurors according to the guidelines set out in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), as refined by the decision in *Witt*. For the sake of shorthand, see *Lockhart* v. *McCree*, 476 U. S. 162 (1986), jurors properly excluded are called "*Witherspoon*-excludables."

[7] In *Enmund*, this Court held that the death penalty would be invalid, under the Eighth and Fourteenth Amendments, for an individual "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U. S., at 797.

[8] At the time of the offense, the settled law in Kentucky was that this defense was available only where the defendant established two elements: that the defendant had been provoked, and that the defendant had acted in a subjectively reasonable way given this provocation. See *Gall* v. *Commonwealth*, 607 S. W. 2d 97, 108–109 (Ky. 1980); *Wellman* v. *Common-*

his sole witness a social worker, Martha Elam, who formerly had been assigned to his case. At the request of petitioner's counsel, she read to the jury from several reports and letters dealing with evaluations of petitioner's mental condition.[9]

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wealth, 694 S. W. 2d 696, 697–698 (Ky. 1985). The defendant has the burden of production on this defense, see *Gall, supra*, at 109, which cannot be established simply by a showing of mental illness, see *Wellman, supra*, at 697.

[9] As a result of a previous arrest on a burglary charge, petitioner, in May 1980, had been placed by the Kentucky Department of Human Resources in the Danville Youth Development Center. App. 38, 40. There he received a psychological examination, the report of which Elam first read during the trial. *Id.*, at 39–41. In this report, among other things, the psychologist made the following observations:

"[Petitioner's] responses to projective tests suggest an individual who is isolated, mistrustful of others and interpersonally deficient. His reproductions of the Bender designs are indicative of emotional disturbance. Along with his test behavior and flat affect, his pattern of test responses suggest[s] a mild thought disorder. He is likely to deal with his thought disturbance in a sociopathic manner. Although he tends to withdraw from others, when pushed, he becomes hostile.

"*Recommendations:*

"[Petitioner's] emotional disturbance and his resentment of his placement at the Danville Youth Development Center appear to militate against his success in this program." *Id.*, at 62–63.

Given this recommendation, petitioner, in July 1980, was transferred to the Northern Kentucky Treatment Center, an institution for emotionally disturbed youths. *Id.*, at 41. There petitioner received another psychological examination, which reads, in pertinent part:

"[Petitioner] presents as a quiet, rather withdrawn and at least moderately depressed sixteen-year-old black youth. He is oriented for time, place, and person. His thinking, however, is extremely simplistic and very concrete. Impulse controls under even minimal stress are felt to be very poor. He is not seen as sophisticated, but rather as a very dependent, immature, probably pretty severely emotionally disturbed, and very easily confused youth. Short-term auditory and visual memory skills are impaired. [Petitioner] has extremely limited capacity for insight. Judgment is impaired. Interactions with peers is *[sic]* likely to be extremely superficial and very guarded. [Petitioner] uses the psychological defenses of projection, denial, rationalization, and isolation extensively. He will be

On cross-examination, the prosecutor had Elam read another progress report made while petitioner was institutionalized.[10] The prosecutor then sought to have Elam read from a report of a psychological evaluation made by Doctor Robert J. G. Lange while petitioner was within the jurisdiction of the juvenile court after his arrest for Poore's murder. Counsel for petitioner and the prosecutor jointly had moved the juvenile court to order this evaluation under Ky. Rev. Stat.

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easily led by other more sophisticated delinquents or youths. He has very limited interpersonal skills and is likely to be seen by other youth as a pawn to be used.

"[Petitioner's] human figure drawings are extremely bizarre. Combined with his flat affect and depressed mood, as well as other suggestions of a cognitive or thought disorder, it is felt that this individual has the potential for developing a full blown schizophrenic disorder. At the present time, he is at least extremely mistrustful, suspicious, and even paranoid. He is in need of ongoing extensive mental health intervention in addition to a highly structured but minimally stressful, from a psychological point of view, residential environment.

"In view of the presence of extreme unmet dependency needs, early and sustained frustration, and minimal success in almost any endeavor there exists the strong probability that underlying considerable passivity and withdrawal is extensive anger and perhaps even rage. Thus, under the proper circumstances, [petitioner] could be expected to be dangerous with respect to acts against persons. While this has not been a part of his history, it needs to be considered with respect to future treatment and eventual disposition." *Id.*, at 65.

Elam also read this report at trial. *Id.*, at 44–45. A month after this evaluation was made, it was noted in petitioner's progress report: "All attempts to motivate [petitioner] toward self improvement have been unsuccessful." *Id.*, at 68 (read by Elam, *id.*, at 46). Less than three weeks later, on Oct. 10, 1980, a Department of Human Resources official notified the juvenile judge in charge of petitioner's case that petitioner was being released into the community, with the observation that "[a]lthough we cannot predict future behavior, we certainly feel that [petitioner] is better able to cope with personal problems." *Id.*, at 70 (read by Elam, *id.*, at 48).

[10] The report read: "As a result of this evaluation, he was determined to be a fairly sophisticated youth who would be capable of manipulative conning type behaviors. He was placed into one of our more mature sophicated *[sic]* groups of counselling." *Id.*, at 55.

§§ 202A.010–202A.990 (1977), which, at the time, governed involuntary hospitalization for psychiatric treatment.[11]

When petitioner objected on the basis that Doctor Lange's evaluation had nothing to do with petitioner's emotional disturbance but only with his competency to stand trial, App. 55, the prosecutor responded that this report dealt with the same matters petitioner already had explored by having Elam read the earlier reports. Petitioner also contended that such an introduction would violate his Fifth and Sixth Amendments rights because his counsel had not been present during the evaluation and petitioner had not been informed that the results could be used against him at trial. *Id.*, at 57–58. Not persuaded by petitioner's arguments, the court permitted Elam to read an edited version of the report,[12] with the observation that "you can't argue about his mental status at the time of the commitment of this offense and exclude evidence when he was evaluated with reference to that mental status." *Id.*, at 56.

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[11] Although there was some confusion initially over who had requested the examination, see Supplemental Brief for Respondent 3 (suggesting that petitioner's counsel had made the request), it now appears that it resulted from a joint motion of the prosecutor and petitioner's counsel. Reply Brief for Petitioner 28; Tr. of Oral Arg. 22. The statute provided criteria for involuntary hospitalization:

"If after their examination the physicians certify that the respondent is a mentally ill person who presents an immediate danger or an immediate threat of danger to self or others as a result of mental illness and that he can reasonably benefit from treatment and that hospitalization is the least restrictive alternative mode of treatment presently available, then such person may be retained in the hospital pending a hearing and order of the appropriate court, or may be transported to an appropriate hospital for retention." Ky. Rev. Stat. § 202A.070(5) (1977).

The purpose of a motion made pursuant to this provision is to enable a defendant to receive psychiatric treatment, *not* to determine his competency to stand trial. The latter is governed by another statutory procedure. See Ky. Rule Crim. Proc. 8.06 (1986); Ky. Rev. Stat. §§ 504.090–504.110 (1985); see also B. Milward, Kentucky Criminal Practice §§ 35.01–35.05 (1983). In fact, according to petitioner's counsel, one of the motives for his motion was to have petitioner receive treatment while petitioner was awaiting trial. Reply Brief for Petitioner 28, n. 21. In making his report, however, Doctor Lange also expressed an opinion as to petitioner's competency to stand trial. App. 73. Perhaps, in light of this opinion, the Kentucky Supreme Court mistakenly labeled Doctor Lange's examination as one for the purposes of determining whether petitioner was competent to stand trial. See 691 S. W. 2d 210, 213 (1985).

The trial court also ordered a psychological evaluation of petitioner for competency purposes but kept the report confidential from both sides and used it only for its own determination. Tr. 10–11 (Dec. 18, 1981).

Petitioner was found guilty on all charges and, pursuant to Kentucky procedure, the jury determined the sentence.[13]

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[12] The edited version, read by Elam, App. 58–59, did not include the section of the report where Doctor Lange referred to petitioner's competency to stand trial. It stated:

"At the initiation of the interview, [petitioner] was slightly apprehensive about why I was there, but the explanation offered soon allayed his anxiety and he relaxed. Rapport was reasonably good, eye contact adequate and [petitioner] was appropriate interactionally in the context of the setting. He was neither especially hostile or friendly, mainly tolerant and cooperative. The discussion focused on the here and now, since the goal was to ascertain meeting of 202a criteria, or not. He was in good reality contact, had reasonable knowledge of current events outside the Center, and seemed to be functioning in the dull normal IQ range. Short and long term memory appeared intact. There was no evidence of hallucinations or delusions. Affects was *[sic]* generally shallow, without emphoria *[sic]* or dysphoria. He seemed somewhat optimistic about the outcome of the changes *[sic]* pending against him. No suicidal ideation is present, though [petitioner] states he has at times been very angry at certain people (staff) at the 'Center' and thought about hurting them. [Petitioner] wasn't especially anxious or restless except initially, and seemed overall relaxed." App. 72–73.

[13] In Kentucky, the jury making the guilt or innocence determination for the felony defendant also determines the punishment to be imposed within the limits fixed by statute. See Ky. Rule Crim. Proc. 9.84(1) (1986); Ky. Rev. Stat. § 532.060 (1985); K. Brickley, Kentucky Criminal Law § 29.01 (1974); Milward, *supra*, at §§ 49.01–49.03. The present Kentucky procedure, not available at the time of petitioner's trial, provides for a separate sentencing hearing before the jury with the presentation of specific evidence by the Commonwealth, such as the defendant's prior acts, and of mitigating evidence by the defendant. See Ky. Rev. Stat. § 532.055 (Supp. 1986).

The jury imposed the maximum sentence on each charge, with the sentences to be served consecutively. *Id.*, at 76–77. The court accepted the sentences but made them run concurrently with the length of the longest term, a life sentence, authorized on the murder charge. See Tr. of Hearing 4–5 (Sept. 14, 1982); Ky. Rev. Stat. § 532.110 (Supp. 1986).[14] Stanford was sentenced to death on the murder charge by the same jury.[15]

The Supreme Court of Kentucky affirmed petitioner's conviction and sentences. 691 S. W. 2d 210 (1985). Among other things, the court rejected petitioner's contention that the "death qualification" of the jury deprived him of his right to an impartial jury drawn from a fair cross section of the community. In its view, a "death-qualified" jury was not "extra-ordinarily conviction-prone," *id.*, at 211; rather, "[a] death-qualified panel tends to ensure those who serve on the jury [will] be willing and able to follow the evidence and law rather than their own preconceived attitudes." *Id.*, at 212. It also stated that persons who are excluded from a jury panel because of their opposition to the death penalty do not constitute a "cognizable group" for the purposes of a fair cross section analysis. *Ibid.*

The court, moreover, rejected petitioner's contention that the trial judge erred in allowing the prosecutor to introduce

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[14] Pursuant to Ky. Rev. Stat. § 532.070(1) (1985), the trial court may reduce a jury sentence for a felony conviction when it believes that it is "unduly harsh." Under the Kentucky procedure applicable at the time of petitioner's trial, after receiving a jury verdict and sentence, the trial judge conducted a sentencing hearing where he considered a previously prepared presentence report, see Ky. Rev. Stat. § 532.050 (1985), whose contents may be controverted by the defendant. See Brickley, *supra*, at § 29.02; Milward, *supra*, at § 49.02.

[15] Under Kentucky law, when a capital defendant is convicted by a jury, he is sentenced by the same jury after a separate sentencing hearing. Ky. Rev. Stat. § 532.025(1)(b) (Supp. 1986); see also Milward, *supra*, at § 49.12. After receiving the jury's sentencing recommendation, the trial judge fixes the sentence. § 532.025(1)(b).

Doctor Lange's report through cross-examination of Elam. It observed that petitioner had "opened the door for the introduction of the competency report by introducing only those DHR reports which were beneficial to him." *Id.*, at 213. It found irrelevant the fact that Doctor Lange had prepared his report in connection with the inquiry into petitioner's competency to stand trial (as we have observed, see n. 11, *supra*, the court misunderstood the purpose of Doctor Lange's examination). In addition, the court concluded that the introduction of the report did not violate petitioner's Fifth Amendment privilege against self-incrimination under *Estelle* v. *Smith*, 451 U. S. 454 (1981). The court reasoned that in *Smith* the defendant's remarks to the examiner were incriminatory, whereas "[i]n this case, the report contained no inculpatory statements by [petitioner] or any accusatory observation by the examiner who merely recited his observations of [petitioner's] outward appearance." 691 S. W. 2d, at 213. Alternatively, the court observed that, if the admission of the competency report had been an error, it was harmless, given petitioner's confession and the overwhelming evidence of his guilt. *Ibid.*

Because of the nature of the issues involved, we granted certiorari, 476 U. S. 1140 (1986).

II

Last Term, in *Lockhart* v. *McCree*, 476 U. S. 162 (1986), this Court held that the Constitution does not "prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." *Id.*, at 165. In particular, the Court rejected McCree's contention that "death qualification" prior to the guilt phase of the trial violated his right under the Sixth and Fourteenth Amendments to an impartial jury selected from a representative cross section of the community. *Id.*, at 178, 184. The decision in *McCree* controls the instant case. In fact, petitioner advances here many arguments identical to those expressly rejected in *McCree.*[16]

A

The Court's reasoning in *McCree* requires rejection of petitioner's claim that "death qualification" violated his right to a jury selected from a representative cross section of the community. It was explained in *McCree* that the fair cross section requirement applies only to venires, not to petit juries. *Id.*, at 173. Accordingly, petit juries do not have to "reflect the composition of the community at large." *Ibid.* More importantly, it was pointed out that, even if this requirement were applied to petit juries, no fair cross section violation would be established when "*Witherspoon*-excludables" were dismissed from a petit jury, because they do not constitute a distinctive group for fair cross section purposes. *Id.*, at 174.

The reasons given in *McCree* for the conclusion that "*Witherspoon*-excludables" are not such a group are equally pertinent here. In "death qualifying" the jury at petitioner's joint trial, the Commonwealth did not arbitrarily single out the "*Witherspoon*-excludables" for a reason unrelated to their ability to serve as jurors at the trial, as, for example, on the basis of race or gender. See *id.*, at 174–175. Rather, the Commonwealth excluded them in order to promote its interest in having a jury that could properly find the facts and apply the law at both the guilt and sentencing phases of the joint trial. Moreover, as was observed in *McCree*, the identification of a group such as the "*Witherspoon*-excludables" does not "create an 'appearance of unfairness,'" *id.*, at 176, because it is related to the Commonwealth's legitimate interest in obtaining a jury that does not contain members who are unable to follow the law with respect to a particular issue in a capital case. Similar reasoning applies in the context of petitioner's joint trial, for the "*Witherspoon*-excludables" would not have been able to assess properly the appropriateness of imposing the death penalty on codefendant Stanford.

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[16] There is no reason to revisit the issue whether social-science literature conclusively shows that "death-qualified" juries are "conviction-prone," although petitioner spends much effort in citing studies to that effect. See Brief for Petitioner 21–25. Most of those studies also were before the Court in *McCree*, see 476 U. S., at 169–170, nn. 4, 5; the Court's discussion of them there see *id.*, at 168–171, need not be repeated here. In any event, just as it was assumed in *McCree* that the studies were "both methodologically valid and adequate to establish that 'death qualification' in fact produces juries *somewhat* more 'conviction-prone' than 'non-death-qualified' juries," *id.*, at 173 (emphasis added), we make a similar assumption here.

Finally, in *McCree* it was emphasized that not all who oppose the death penalty are excludable for cause. Those who indicate that they can set aside temporarily their personal beliefs in deference to the rule of law may serve as jurors. Even those who are "*Witherspoon*-excludables" are not substantially deprived of "their basic rights of citizenship," because they are not prevented from serving as jurors in other criminal cases. *Ibid.* Although, as here, "*Witherspoon*-excludables" will be barred from participating in joint trials where the jury will be required to assess the appropriateness of the death penalty for one of the defendants, this incremental restriction on the ability of those individuals to serve on juries is not constitutionally impermissible.

The facts of the case at bar do not alter the conclusion that "*Witherspoon*-excludables" are not a distinctive group for fair cross section purposes. Thus, there is no violation of the Sixth Amendment's fair cross section requirement here.[17]

B

The analysis in *McCree* also forecloses petitioner's claim that he was denied his right to an impartial jury because of the removal of "*Witherspoon*-excludables" from the jury at his joint trial. The Court considered a similar claim in *McCree* that was directed at the exclusion of such jurors prior to the guilt phase of a capital defendant's trial. *Id.*, at 179. It rejected McCree's claim that the impartial-jury requirement demanded a balancing of jurors with different predilections because that view was inconsistent with the Court's understanding that jury impartiality requires only "'jurors who will conscientiously apply the law and find the facts.'" *Id.*, at 178, quoting *Wainwright* v. *Witt*, 469 U. S. 412, 423 (1985). It reasoned that this balancing of juror viewpoints sought by McCree was impractical because it would require a trial judge to ensure "that each [jury] contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on." 476 U. S., at 178.

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[17] Given this conclusion, there is no reason to address petitioner's description of the *result* of the "death qualification"—the race, sex, political party, and age composition of the jury in his case, see Brief for Petitioner 31, n. 52—a description that, in any event, is not part of the record.

The Court further explained in *McCree* that the State's interest in having a single jury decide all the issues in a capital trial was proper, and it distinguished that case from the situations in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and *Adams* v. *Texas*, 448 U. S. 38 (1980), where Illinois and Texas "crossed the line of neutrality" in striking a venire member who expressed any scruple about the death penalty. 476 U. S., at 179–180, quoting *Witherspoon*, 391 U. S., at 520. It also acknowledged the State's interest in the possibility that a defendant might benefit at the sentencing phase from any "'residual doubts'" about the evidence at the guilt phase that the jury might have had. 476 U. S., at 181. In addition, given that much of the same evidence would be presented at both phases of the capital trial, the Court thought appropriate the interest in not putting either the prosecution or the defense to the burden of having to present the evidence and testimony twice. *Ibid.* Finally, it distinguished McCree's claim from the situations presented in *Witherspoon* and *Adams* because it did not deal with "the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an 'imbalanced jury.'" 476 U. S., at 182–183. In the guilt phase of McCree's trial, the jury's discretion was traditionally circumscribed. *Id.*, at 184.

Although petitioner contends that the Commonwealth's interests in having "*Witherspoon*-excludables" removed from his jury were minimal in comparison to the prejudice he suffered by being convicted and sentenced by this jury, Brief for Petitioner 26, and n. 42, these interests are similar to those identified in *McCree* and equally as compelling. Petitioner's primary error is his characterization of the issue presented here as affecting *his* trial, as opposed to the *actual* trial in this case—the joint trial of petitioner and Stanford. As demonstrated by the statutory provisions providing for joinder of offenses and defendants, see n. 4, *supra*, the Commonwealth has determined that it has an interest in providing prosecutors with the authority to proceed in a joint trial when the conduct of more than one criminal defendant arises out of the same events.

Underlying the Commonwealth's interest in a joint trial is a related interest in promoting the reliability and consistency of its judicial process, an interest that may benefit the noncapital defendant as well. In joint trials, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials. From such a perspective, it may be able to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing. See ABA Standards for Criminal Justice Standard 13–2.2 (2d ed. 1980). This jury perspective is particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events, where there is a single victim, and where, in fact, the defendants are indicted on several of the same counts. Indeed, it appears that, by not moving to sever his case from that of Stanford, petitioner made the tactical decision that he would fare better if he were tried by the same jury that tried Stanford, the "triggerman" in Poore's murder.

The Commonwealth's interest in a joint trial also is bound up with a concern that it not be required to undergo the burden of presenting the same evidence to different juries where, as here, two defendants, only one of whom is eligible for a death sentence, are charged with crimes arising out of the same events. Indeed, if petitioner's position—that, because a "death-qualified" jury is conviction prone and likely to mete out harsher sentences, it should be used only in the capital case—were accepted, its logic would lead to an anomalous result: if, as in Stanford's case, a capital defendant also is charged with noncapital offenses, according to petitioner there would have to be one trial for those offenses and another for the capital offense. Such a result would place an intolerable administrative burden upon the Commonwealth.[18]

Where, as here, one of the joined defendants is a capital defendant and the capital-sentencing scheme requires the use of the same jury for the guilt and penalty phases of the capital defendant's trial, the interest in this scheme, which the Court recognized as significant in *McCree*, 476 U. S., at 182, coupled with the Commonwealth's interest in a joint trial, argues strongly in favor of permitting "death qualification" of the jury.

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[18] Given the significant state interests in having one jury for both the guilt and penalty phases of a joint trial, there is no reason to treat in any detail the alternatives to this procedure that petitioner proposes. See Brief for Petitioner 27–29. As it is, there is some conflict between these alternatives that reflects petitioner's ambiguity as to the exact nature of the relief he seeks: it is unclear whether he wishes to avoid a "death-qualified" jury at the guilt phase, the penalty phase, or both. For example, one alternative proposed by petitioner, see *id.*, at 28, to which he alluded at oral argument, see Tr. of Oral Arg. 44, would be to have one jury for the guilt phase for both defendants and for the penalty phase for petitioner (this jury being not "death qualified") and another "death-qualified" jury for the penalty phase for the capital defendant. On the other hand, there is the alternative, also acknowledged by petitioner at oral argument, see *id.*, at 46, of using a "death-qualified" jury for the guilt phase for both defendants and for the capital defendant's penalty phase, and another jury (not "death qualified") for petitioner's penalty phase. The latter alternative would guard against the alleged partiality of a "death-qualified" jury only insofar as this jury attribute would affect his sentence.

Whatever might be the proper focus of petitioner's demand for relief, the alternatives basically require the Commonwealth either to abandon the "death qualification" of juries at the guilt phase of a joint trial or to empanel an additional jury. We decline to place either burden on the Commonwealth.

Again, as in *McCree*, the particular concern about the possible effect of an "'imbalanced' jury" in the "special context of capital sentencing," *id.*, at 182, is not present with respect to the guilt and sentencing phases of a noncapital defendant in this case. For, at the guilt phase, the jury's discretion traditionally is more channeled than at a capital-sentencing proceeding, and, at the penalty phase, the jury's sentence is limited to specific statutory sentences and is subject to review by the judge. See nn. 13 and 14, *supra*. In fact, the control of the judge over jury discretion in the noncapital-sentencing decision worked well in petitioner's case when the court ordered that his multiple sentences be served concurrently with the life sentence on the murder charge.[19]

Accordingly, petitioner's claim that a "death-qualified" jury lacks impartiality is no more persuasive than McCree's. As was stated in *McCree*, "the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." 476 U. S., at 184. Given this presupposition and the significant interests in having a joint trial of petitioner and Stanford, there was no violation of petitioner's Sixth and Fourteenth Amendments right to an impartial jury.

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[19] Although petitioner suggests that rejection of his argument may lead prosecutors to request the death penalty in order to have the jury "death qualified," only to abandon this request at the penalty phase, see Brief for Petitioner 27, there is no evidence of prosecutorial action of this kind here. The prosecutor sought the death penalty against both petitioner and Stanford until the court granted, with the prosecutor's acquiescence, petitioner's motion to withdraw the ultimate penalty against him. App. 24. This determination was made *before* the commencement of *voir dire*. Moreover, in Kentucky the prosecutor can seek the death penalty *only* in a special class of capital cases where a statutory aggravating factor is present. See Ky. Rev. Stat. §§ 532.025(2)(a) and (3) (Supp. 1986).

III

A

This Court's precedent also controls petitioner's claim as to the prosecutor's use of Doctor Lange's report. In *Estelle* v. *Smith*, 451 U. S. 454 (1981), we were faced with a situation where a Texas prosecutor had called as his only witness at a capital-sentencing hearing a psychiatrist, who described defendant Smith's severe sociopathic condition and who expressed his opinion that it could not be remedied by treatment. *Id.*, at 459–460. The psychiatrist was able to give this testimony because he had examined Smith at the request of the trial judge, who had not notified defense counsel about the scope of the examination or, it seemed, even about the existence of the examination. *Id.*, at 470–471, and n. 15. Moreover, Smith's counsel neither had placed at issue Smith's competency to stand trial nor had offered an insanity defense. See *id.*, at 457, and n. 1, 458. Under the then-existing Texas capital-sentencing procedure, if the jury answered three questions in the affirmative, the judge was to impose the death sentence. See *id.*, at 457–458. One of these questions concerned the defendant's future dangerousness, an issue that the psychiatrist in effect addressed.

We concluded that there was a Fifth Amendment violation in the prosecutor's presentation of such testimony at the sentencing proceeding. After noting that the Fifth Amendment was applicable at a capital-sentencing hearing, we observed that the psychiatrist's prognosis of Smith's future dangerousness was not based simply on his observations of the defendant, but on detailed descriptions of Smith's *statements* about the underlying crime. *Id.*, at 464, and n. 9. Accordingly, in our view, Smith's communications to the psychiatrist during the examination had become testimonial in nature. Given the character of the psychiatrist's testimony, moreover, we were unable to consider his evaluation to be "a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense." *Id.*, at 465. We concluded: "When [at trial the psychiatrist] went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.*, at 467. In such a situation, we found a Fifth Amendment violation because of the failure to administer to Smith, before the examination, the warning required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

We recognized, however, the "distinct circumstances" of that case, 451 U. S., at 466—the trial judge had ordered, *sua sponte*, the psychiatric examination and Smith neither had asserted an insanity defense nor had offered psychiatric evidence at trial. We thus acknowledged that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense:

> "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist." *Id.*, at 465.

We further noted: "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.*, at 468. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution. See *United States* v. *Byers*, 239 U. S. App. D. C. 1, 8–10, 740 F. 2d 1104, 1111–1113 (1984) (plurality opinion); *Pope* v. *United States*, 372 F. 2d 710, 720 (CA8 1967) (en banc), vacated and remanded on other grounds, 392 U. S. 651 (1968).

This case presents one of the situations that we distinguished from the facts in *Smith*. Here petitioner's counsel joined in a motion for Doctor Lange's examination pursuant to the Kentucky procedure for involuntary hospitalization. Moreover, petitioner's entire defense strategy was to establish the "mental status" defense of extreme emotional disturbance. Indeed, the *sole* witness for petitioner was Elam, who was asked by defense counsel to do little more than read to the jury the psychological reports and letter in the custody of Kentucky's Department of Human Services. In such circumstances, with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence. Accordingly, the Commonwealth asked Elam to read excerpts of Doctor Lange's report, in which the psychiatrist had set forth his general observations about the mental state of petitioner but had not described *any* statements by petitioner dealing with the crimes for which he was charged.[20] The introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation.

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[20] Petitioner argues that the jury may have been confused by the introduction of a report dealing with his competency to stand trial, a very different issue from his mental condition at the time of the crime that was the focus of his extreme-emotional-disturbance defense. Brief for Petitioner 43, and n. 68. Once more it is necessary to repeat that Doctor Lange's examination had as its purpose the determination whether petitioner should be committed for psychiatric treatment, not whether he was competent to stand trial. See n. 11, *supra*. Doctor Lange's observation that petitioner was competent to stand trial, see App. 73, was volunteered and, before Elam read Doctor Lange's report to the jury, the court eliminated all such references. *Id.*, at 58–59. Thus, what the jury heard from Doctor Lange's report was an evaluation of petitioner's mental condition. Although the doctor did note that petitioner reported thinking of "hurting"

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In *Estelle* v. *Smith*, we also concluded that Smith's Sixth Amendment right to the assistance of counsel had been violated. 451 U. S., at 469–471. As we observed, it was unclear whether Smith's counsel had even been informed about the psychiatric examination. *Id.*, at 471, n. 15. We determined that, in any event, defense counsel was not aware that the examination would include an inquiry into Smith's future dangerousness. *Id.*, at 471. Thus, in our view, Smith had not received the opportunity to discuss with his counsel the examination or its scope. *Ibid.* Here, in contrast, petitioner's counsel himself requested the psychiatric evaluation by Doctor Lange. It can be assumed—and there are no allegations to the contrary—that defense counsel consulted with petitioner about the nature of this examination.

Petitioner attempts to bring his case within the scope of *Smith* by arguing that, although he agreed to the examination, he had no idea, because counsel could not anticipate, that it might be used to undermine his "mental status" defense. Brief for Petitioner 48–49. Petitioner, however, misconceives the nature of the Sixth Amendment right at issue here by focusing on the use of Doctor Lange's report rather than on the proper concern of this Amendment, the consultation with counsel, which petitioner undoubtedly had. Such consultation, to be effective, must be based on counsel's being informed about the scope and nature of the proceeding. There is no question that petitioner's counsel had this information. To be sure, the effectiveness of the consultation

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staff members at the facility, *id.*, at 72, such remarks only would have reinforced comments in earlier reports. See, *e. g.*, *id.*, at 45 ("Thus, under the proper circumstance, [petitioner] could be expected to be dangerous with respect to acts against other persons"). In sum, his report was similar in nature to the others read by Elam, except, of course, that Doctor Lange performed his evaluation at a later time.

also would depend on counsel's awareness of the possible uses to which petitioner's statements in the proceeding could be put. Given our decision in *Smith*, however, counsel was certainly on notice that if, as appears to be the case, he intended to put on a "mental status" defense for petitioner, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal.[21] In these circumstances, then, there was no Sixth Amendment violation.

The judgment of the Supreme Court of Kentucky is affirmed.

It is so ordered.

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[21] Petitioner contends that, if the use of a pretrial psychological evaluation is allowed, as in this case, defense counsel will be reluctant to request competency evaluations, even if they believe that their clients are in need of one, or they may "sandbag" the trial by raising the competency issue in a post-trial motion. Brief for Petitioner 42. Moreover, petitioner argues that the rule requiring competency examinations when the trial judge has doubts about a defendant's mental condition, see *Pate* v. *Robinson*, 383 U. S. 375 (1966), will be undermined by a decision in favor of the Commonwealth.

While we cannot foresee the tactics of defense counsel, we find somewhat curious petitioner's prediction and proposed solution. Where a competency examination is required under *Pate* and where the defendant does not place his mental state at issue, the Fifth and Sixth Amendments would mandate that he be allowed to consult with counsel and be informed of his right to remain silent. We observed in *Smith* that if, after receiving such advice and warnings, a defendant expresses his desire to refuse to answer any questions, the examination can still proceed "upon the condition that the results would be applied solely for that purpose." 451 U. S., at 468. Thus, where a defendant does not make an issue of his mental condition, we fail to see how the decision today will undermine *Pate*. Where, however, a defendant places his mental status at issue and thus relies upon reports of psychological examinations, he should expect that the results of such reports may be used by the prosecutor in rebuttal.

Finally, even if there were any conceivable constitutional error here, we would find it harmless in the circumstances of this case. As we noted above, see n. 8, *supra*, the defense of extreme emotional disturbance also requires a showing of provocation and cannot be established solely by evidence of mental illness. In petitioner's case, provocation was not demonstrated. Tr. of Oral Arg. 40; see also 691 S. W. 2d, at 212.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins and JUSTICE STEVENS joins as to Part I, dissenting.

I dissented from this Court's holding in *Lockhart* v. *McCree*, 476 U. S. 162 (1986), that "death-qualifying" a jury in a capital case before the guilt phase of the trial was constitutionally permissible. Today's extension of that holding to permit death qualification in a *joint* trial, where not all of the defendants face capital charges, compels me to dissent again. No interest of the Commonwealth of Kentucky justified the invasion of petitioner's Sixth Amendment rights when potential jurors were excluded on the basis of their answers to questions about an issue that was totally unrelated to the exclusively noncapital charges on which he was tried. If the Commonwealth chose to proceed with a joint trial, it was nonetheless required to observe petitioner's constitutional right to an impartial and representative jury.

I also dissent on the second issue in this case: whether admission of the information contained in the mental status report regarding petitioner's qualifications for involuntary hospitalization and treatment pending trial violated his Fifth and Sixth Amendment rights. This information was irrelevant to the issue on which it was admitted and, more importantly, was obtained for therapeutic purposes that can only be undermined by the Court's decision today. Petitioner legitimately expected that he would not, by requesting this limited mental examination, be generating evidence admissible against him at trial on issues unrelated to the charged offenses. His request for the examination was therefore uninformed and constituted no waiver of his Fifth and Sixth Amendment rights.

I

As it did in *McCree*, *supra*, at 173, the Court today *assumes* that the accumulated scholarly studies demonstrate that death qualification produces juries abnormally prone to convict. *Ante*, at 415, n. 16. This assumption is well founded.

The evidence is "overwhelming" that death-qualified juries are "substantially more likely to convict or to convict on more serious charges than juries on which unalterable opponents of capital punishment are permitted to serve." 476 U. S., at 184 (MARSHALL, J., dissenting).

This Court nevertheless held in *McCree* that the interest of the State of Arkansas in having a single jury decide both guilt or innocence and the appropriate sentence was sufficient to reject a proposal made in *Witherspoon* v. *Illinois*, 391 U. S. 510, 520, n. 18 (1968), that separate juries decide these issues. The justifications for using a single jury were to avoid repetitive proceedings and to ensure that the capital defendant benefited at sentencing from any "residual doubt" regarding his guilt. See 476 U. S., at 181. However, Arkansas' asserted interest in efficient trial management was overvalued, and the "residual doubt" justification for the single jury untenable, unless the capital defendant's option to waive this purported benefit is recognized. *Id.*, at 205 (MARSHALL, J., dissenting). Today the Court again invokes the efficiency and "residual doubt" theories to justify use of a single jury in a capital trial. But it extends this reasoning to apply to a defendant who is tried jointly on exclusively noncapital charges.

As I observed in *McCree*, there are relatively few capital trials among state criminal prosecutions, and even fewer capital defendants are actually subjected to sentencing proceedings. The additional costs of implementing a system of separate juries, or of providing alternate jurors who would replace those who opposed the death penalty after the guilt determination had been made, are therefore minimal by comparison. Indeed, it appears that States would *save* time and resources by not death-qualifying jurors before the guilt phase of every capital case. *Id.*, at 204–205. In this case, the Commonwealth's asserted interest in efficiency is even more attenuated than it was in *McCree*. The Court cites the "burden of presenting the same evidence to different juries," *ante*, at 418, but it can only *presume* the magnitude of this burden. The Commonwealth has in no manner substantiated its claim that providing separate juries or alternate jurors in joint trials involving noncapital defendants would create an intolerable administrative burden.[1] It cites no other instance of having prosecuted a noncapital defendant alongside a capital defendant. The rarity of joint trials such as petitioner's belies any claim that the cost of empaneling an extra jury, or of providing alternate jurors, overrides his interest in being tried before a jury that is not uncommonly conviction prone. Moreover, under these proposals, the presentation of evidence need *not* have taken place more than once: one jury, not death qualified, could sit to decide guilt for both defendants and a sentence for the noncapital defendant, while simultaneously a death-qualified jury, or a number of death-qualified alternates, could hear the same evidence in preparation for a possible sentencing proceeding for the capital defendant.[2]

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[1] Indeed, the fact that the Commonwealth requires bifurcated proceedings, with the possibility of empaneling separate juries "for good cause," Ky. Rev. Stat. § 532.080(1) (1985), to impose enhanced sentences on persistent felony offenders is strong evidence that its claim of administrative burden in the present case is exaggerated.

[2] To bolster its perception of the Commonwealth's administrative burden, the Court describes an "anomalous result" that it believes would inexorably obtain if petitioner's proposals were accepted, in cases in which a capital defendant is also charged with noncapital offenses, indicating that more than one trial would logically be required. *Ante*, at 419. I disagree. In the first place, no such claim by a capital defendant has been presented to this Court. If this claim were presented, however, I would, consistent with my dissent in *Lockhart* v. *McCree*, 476 U. S. 162, 203–206 (1986), hold that separate juries for the guilt and sentencing issues should be empaneled, or that alternate jurors should be provided so that death qualification could occur only after a decision had been reached on the defendant's guilt or innocence on *all* alleged offenses. Separate *trials* would not necessarily be required. But even if they were, the Commonwealth has altogether failed to demonstrate the incidence of the separate trials that might

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Nor is the assertion that petitioner might have benefited from a joint trial before a death-qualified jury defensible. The application of this variant of the "residual doubt" theory is, at best, speculative. I can find no record support for the Court's suggestion that, by not moving to sever his case from that of the capital defendant, "petitioner made the tactical decision that he would fare better if he were tried by the same jury," *ante*, at 418, whether the issue were his responsibility relative to the noncapital defendant in the commission of the noncapital offenses, his culpability relative to that defendant for sentencing purposes, or the possibility of lingering doubts as to his guilt on the noncapital charges resulting in a more favorable sentence recommendation. More importantly, the Court's suggestion that the joint trial before a death-qualified jury was in petitioner's best interest is untenable, in light of its refusal to allow petitioner the option of waiving this perceived benefit. See *McCree*, *supra*, at 205 (MARSHALL, J., dissenting).[3]

The joint-trial aspect of this case permits the Court to venture an additional justification for a single jury not applicable in *McCree:* "promoting the reliability and consistency" of the judicial process. *Ante*, at 418. But petitioner's proposals for separate juries or alternate jurors in no way endanger these

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occur. I cannot accept the Court's invocation of a perceived burden, totally unmeasured, in order to justify petitioner's trial before an uncommonly conviction-prone jury.

[3] The record, in fact, precludes any inference that petitioner somehow benefited from the assessment of this death-qualified jury regarding his guilt and sentence. The jury flatly ignored the prosecutor's specific explanation in closing argument that the Commonwealth was *not* asking for a finding of guilt under the instruction on intentional murder, the crime for which petitioner was convicted, but rather under a theory of conspiracy. Tr. 1336 (Aug. 2–13, 1982); App. 74–75. The sentence fixed by the jury for each offense—murder, robbery, rape, and sodomy—was the maximum the law allowed, and the jury took the unusual step of directing on its own initiative that the sentences be served consecutively. Tr. 1347–1348 (Aug. 2–13, 1982); App. 75.

interests. Regarding guilt or innocence as between capital and noncapital defendants tried jointly, a single nondeath-qualified jury would make reliable and consistent findings, findings that are not tainted by the proven conviction-prone character of a death-qualified jury. That same jury's recommended sentence for the noncapital defendant would, by its very nature, be fully informed. A separate death-qualified jury, or the original jury now death qualified with alternates replacing jurors who oppose the death penalty, would hear additional evidence and assess the appropriate sentence for the capital defendant. These jurors, having all observed the guilt phase of the trial as well, would be fully apprised of the acts underlying the offenses for which convictions were returned. There simply remains the matter of consistency as between the defendants regarding their respective sentences. The sentencing alternatives for the convicted capital defendant are life and death. These options equal or exceed in severity the possible sentences the noncapital defendant may receive. There is no danger that the noncapital defendant would be punished more severely than the capital defendant. Petitioner's suggested alternatives would, therefore, not produce unreliable or inconsistent assessments of guilt or of culpability for sentencing purposes.

Petitioner sought simply to have his guilt or innocence and possible sentences on exclusively noncapital charges determined by jurors as impartial as those that sit in all other noncapital cases. Death qualification unfairly tilts the scales of justice in favor of the prosecution, and was particularly unfair in this case because the qualification criteria were entirely unrelated to the issues to be decided with respect to this defendant. It is conceded, see Tr. Oral Arg. 34, and the Court's analysis today implicitly accepts, that the Sixth Amendment would have prohibited death qualification had petitioner been tried alone. Having chosen to proceed with a joint trial, it is incumbent on the Commonwealth to justify the resulting deprivation of petitioner's constitutional right to have an impartial and representative jury decide his fate. No interest of the Commonwealth justifies death qualification before the guilt phase in a trial against a capital defendant, and *a fortiori* no interest justifies death qualification of a jury that is to decide issues affecting a noncapital defendant in a joint capital trial. Today's decision, like others before it, is the product of this Court's "unseemly eagerness to recognize the strength of the State's interest in efficient law enforcement and to make expedient sacrifices of the constitutional rights of the criminal defendant to such interests." *Wainwright* v. *Witt*, 469 U. S. 412, 462–463 (1985) (BRENNAN, J., dissenting).

II

In his defense, petitioner relied on psychological reports prepared while he was in the custody of the Commonwealth's juvenile justice system before the commission of the crimes in this case. See *ante*, at 408–409, and n. 9. These reports tended to establish that he had suffered from emotional disturbance and had been in need of treatment. A lack of treatment would have supported a finding that petitioner had later acted, at the time of the crimes charged, "under the influence of extreme emotional disturbance." Ky. Rev. Stat. § 507.020(1)(a) (1985). Such a finding would have precluded petitioner's conviction of murder. To rebut this evidence of emotional disturbance, the Commonwealth introduced over objection the contents of a mental status report prepared at the request of both petitioner and the Commonwealth after petitioner had been arrested, and addressing issues wholly unrelated to his mental state at the time of the alleged offense.

In accordance with the parties' request, the examiner assessed whether petitioner met the criteria for involuntary hospitalization and treatment pending trial. The focus of the examiner during his "one hour" interview with petitioner was on the "here and now," and not on petitioner's mental condition when the killing occurred, seven months earlier. App.

72; see *ante*, at 412, n. 12. As such, the information in the report was irrelevant to the issue on which it was admitted. Yet the limited focus of the report is significant: it demonstrates the fundamental distinction between an examination for the purpose of assessing a defendant's then-present amenability to involuntary hospitalization and treatment pending trial, and an examination for the purpose of assessing the defendant's prior mental condition at the time of the alleged offense. The Court acknowledges this temporal difference, *ante*, at 423–424, n. 20, but misses its importance.[4]

The Kentucky statute governing involuntary hospitalization and treatment at the time of petitioner's examination was designed to assist the mentally ill person who currently "presents an immediate danger or an immediate threat of danger to self or others as a result of mental illness," who "can reasonably benefit from treatment," and for whom "hospitalization is the least restrictive alternative mode of treatment presently available." Ky. Rev. Stat. § 202A.070(5) (1977). Clearly, the examination was not intended to generate evidence of a defendant's criminal responsibility, including his mental status at the time of an alleged offense. The examination takes its meaning instead from humanitarian and therapeutic concerns unrelated to the prosecution of criminal defendants, concerns that may be fully served only by the unimpeded establishment of relations of trust and cooperation among the physician, the Commonwealth, and the potential patient. These concerns apply with full force to the mentally ill criminal defendant, and in this context require the trust and cooperation of the defendant's attorney as well. If the purposes of the involuntary hospitalization and treatment provision are to be attained, and examinations are to be accurate and treatments effective, the defendant must feel free to request an examination without lingering fears that the content of his discussions with the examiner, or the examiner's impressions of his current mental status, will be used against him at trial.[5]

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[4] The Court emphasizes instead the different purposes of an examination for competency to stand trial and an examination for pretrial involuntary hospitalization and treatment. *Ante*, at 423–424, n. 20. Yet both types of examination focus on the defendant's *present* mental condition. Nor is it sufficient to observe that the reports relied upon by petitioner and the report relied upon by the Commonwealth were "similar in nature," only produced following evaluations "performed" at different times. *Ibid.* The relevant distinctions are the temporal focuses and underlying purposes of the examinations themselves.

It is no doubt possible, though I believe unlikely, that the Commonwealth intended to offer petitioner the possibility of "involuntary" hospitalization and treatment pending trial only on the condition that he waive objections to the admission of inculpatory statements given or impressions made during his examination. However, because such a decision is totally at odds with the fulfillment of the statute's underlying purposes, it cannot be *assumed* that either petitioner or his attorney knew of this condition when joining a request for the examination. To the contrary, the fair assumption is that petitioner implicitly limited his consent to the examination with due regard for the purposes it was designed to serve. Our decision in *Estelle* v. *Smith*, 451 U. S. 454 (1981), contrary to the Court's reading of it today, *ante*, at 425, did not put petitioner and counsel on notice that statements made during this examination could be used by the Commonwealth to rebut petitioner's temporally and functionally unrelated evidence of emotional disturbance. *Estelle* v. *Smith* did not hold that the contents of *any* psychological report may be admitted as rebuttal evidence on an issue of the defendant's mental status. Petitioner's request for the examination was materially uninformed, as was his consultation with counsel. He was therefore denied his rights under the the Fifth and Sixth Amendments, which demand more sensitive consideration of the limited purposes of specific psychiatric examinations than the Court is willing to recognize today.[6]

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[5] The Commonwealth is free, of course, to compel a *separate* examination specifically inquiring as to the mental condition of the defendant at the time of the alleged offense, once put on notice that the defendant will place this mental condition in issue. *Estelle* v. *Smith*, 451 U. S. 454, 465 (1981). Given notice, the Commonwealth bears full responsibility for being prepared at trial to rebut a mental status defense.

Though not essential to my view of the proper resolution of this case, there can be no argument that petitioner exploited protected examination procedures in order to manufacture evidence to support a mental status defense. The psychological reports upon which he relied at trial were prepared at the Commonwealth's insistence while petitioner was under the supervision of the juvenile justice system. Moreover, the examinations were conducted *before* the crimes in this case were committed, thus preventing any inference that the evidence of petitioner's emotional disturbance was a product of self-serving origin.

I respectfully dissent.

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[6] The right to be tried and convicted only if legally competent inheres in the Fourteenth Amendment, see *Pate* v. *Robinson*, 383 U. S. 375, 378 (1966), and thus implicates constitutional principles in addition to the Fifth and Sixth Amendment requirements of an informed request for a mental examination and informed consultation with counsel. As the Court correctly points out, though the purposes of a competency examination and an examination to assess amenability to involuntary hospitalization and treatment differ, *ante*, at 411, n. 11, and 423–424, n. 20, the examinations share an identical temporal focus and may be ordered against the wishes of a criminal defendant. Moreover, the integrity of the clinical endeavor envisioned by both examinations requires the creation and maintenance of relations among the prosecution, defense, examiner, and defendant that are as open and as cooperative as possible. Therefore, I also reject the Court's suggestion that, where a defendant places his mental status at the time of the alleged offense in issue by relying on reports of psychological examinations that do not address mental competency at the time of trial, he should expect that the results of his competency examination may be used by the prosecutor in rebuttal. *Ante*, at 425, n. 21.

SOLORIO *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

No. 85-1581. Argued February 24, 1987—Decided June 25, 1987

A general court-martial was convened under the Uniform Code of Military Justice (Code) in New York, where petitioner was serving in the Coast Guard, to try him for the sexual abuse of fellow coastguardsmen's minor daughters in his privately owned home in Alaska during a prior tour of duty. The Code empowers courts-martial to try servicemen for such crimes. However, the court granted petitioner's motion to dismiss on the ground that it lacked jurisdiction under *O'Callahan* v. *Parker*, 395 U. S. 258, which held that a military tribunal may not try a serviceman charged with a crime that has no "service connection," and *Relford* v. *Commandant, U. S. Disciplinary Barracks*, 401 U. S. 355, which enumerated numerous factors to be weighed in determining whether an offense is service connected. The Coast Guard Court of Military Review reversed the dismissal and reinstated the charges, and the Court of Military Appeals affirmed, concluding that the Alaska offenses were service connected within the meaning of *O'Callahan* and *Relford*.

Held: The jurisdiction of a court-martial depends solely on the accused's status as a member of the Armed Forces, and not on the "service connection" of the offense charged. Thus, *O'Callahan* is overruled. The plain meaning of Art. I, § 8, cl. 14, of the Constitution—which grants Congress plenary power "[t]o make Rules for the Government and Regulation of the land and naval Forces"—supports the military status test, as was held in numerous decisions of this Court prior to *O'Callahan*. *O'Callahan's* service connection test is predicated on the Court's less-than-accurate reading of the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries, which history is far too ambiguous to justify the restriction on Clause 14's plain language which the Court imported to it. Clause 14 answers concerns about the general use of military courts for the trial of ordinary crimes by vesting in Congress, rather than the Executive, authority to make rules for military governance. The Clause grants Congress primary responsibility for balancing the rights of servicemen against the needs of the military, and Congress' implementation of that responsibility is entitled to judicial deference. That civil courts are "ill equipped" to establish policies regarding matters of military concern is substantiated by the confusion evidenced in military court decisions attempting to apply the service connection approach, even after *Relford*. Pp. 438–451.

21 M. J. 251, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, POWELL, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 451. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in all but the last paragraph of which BLACKMUN, J., joined, *post*, p. 452.

Robert W. Bruce, Jr., argued the cause and filed briefs for petitioner.

Eugene R. Fidell argued the cause for the American Civil Liberties Union as *amicus curiae* urging reversal. With him on the brief were *George Kannar, Burt Neuborne, Arthur B. Spitzer*, and *Keith M. Harrison.*

Solicitor General Fried argued the cause for the United States. With him on the brief were *Assistant Attorney General Weld, Deputy Solicitor General Bryson, Paul J. Larkin, Jr., John F. De Pue*, and *Thomas J. Donlon.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (U. C. M. J.) to try a member of the Armed Forces depends on the "service connection" of the offense charged. We hold that it does not, and overrule our earlier decision in *O'Callahan* v. *Parker*, 395 U. S. 258 (1969).

While petitioner Richard Solorio was on active duty in the Seventeenth Coast Guard District in Juneau, Alaska, he sexually abused two young daughters of fellow coastguardsmen.

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*Briefs of *amici curiae* urging reversal were filed for the Defense Appellate Division, United States Army, by *Brooks B. La Grua;* and for Vietnam Veterans of America by *Ronald William Meister* and *Barton F. Stichman.*

David C. Larson filed a brief for the Appellate Defense Division, United States Navy-Marine Corps Appellate Review Activity, as *amicus curiae.*

Petitioner engaged in this abuse over a 2-year period until he was transferred by the Coast Guard to Governors Island, New York. Coast Guard authorities learned of the Alaska crimes only after petitioner's transfer, and investigation revealed that he had later committed similar sexual abuse offenses while stationed in New York. The Governors Island commander convened a general court-martial to try petitioner for crimes alleged to have occurred in Alaska and New York.

There is no "base" or "post" where Coast Guard personnel live and work in Juneau. Consequently, nearly all Coast Guard military personnel reside in the civilian community. Petitioner's Alaska offenses were committed in his privately owned home, and the fathers of the 10- to 12-year-old victims in Alaska were active duty members of the Coast Guard assigned to the same command as petitioner. Petitioner's New York offenses also involved daughters of fellow coastguardsmen, but were committed in Government quarters on the Governors Island base.

After the general court-martial was convened in New York, petitioner moved to dismiss the charges for crimes committed in Alaska on the ground that the court lacked jurisdiction under this Court's decisions in *O'Callahan* v. *Parker*, *supra*, and *Relford* v. *Commandant, U. S. Disciplinary Barracks*, 401 U. S. 355 (1971).[1] Ruling that the Alaska offenses were not sufficiently "service connected" to be tried in the military criminal justice system, the court-martial judge granted the motion to dismiss. The Government appealed the dismissal of the charges to the United

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[1] Petitioner was charged with 14 specifications alleging indecent liberties, lascivious acts, and indecent assault in violation of U. C. M. J., Art. 134, 10 U. S. C. § 934, 6 specifications alleging assault in violation of Art. 128, 10 U. S. C. § 928, and 1 specification alleging attempted rape in violation of Art. 80, 10 U. S. C. § 880. The specifications alleged to have occurred in Alaska included all of the Article 128 and Article 80 specifications and 7 of the Article 134 specifications.

States Coast Guard Court of Military Review, which reversed the trial judge's order and reinstated the charges. 21 M. J. 512 (1985).

The United States Court of Military Appeals affirmed the Court of Military Review, concluding that the Alaska offenses were service connected within the meaning of *O'Callahan* and *Relford*. 21 M. J. 251 (1986). Stating that "not every off-base offense against a servicemember's dependent is service-connected," the court reasoned that "sex offenses against young children . . . have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned." *Id.*, at 256. In reaching its holding, the court also weighed a number of other factors, including: the interest of Alaska civilian officials in prosecuting petitioner; the hardship on the victims, who had moved from Alaska, that would result if they were called to testify both at a civilian trial in Alaska and at the military proceeding in New York; and the benefits to petitioner and the Coast Guard from trying the Alaska and New York offenses together.[2] This Court subsequently granted certiorari pursuant to 28 U. S. C. § 1259(3) (1982 ed., Supp. III) to review the decision of the Court of Military Appeals. 476 U. S. 1181 (1986). We now affirm.

The Constitution grants to Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, § 8, cl. 14. Exercising this authority, Congress has empowered courts-martial to try servicemen for the crimes proscribed by the U. C. M. J.,

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[2] Following the decision of the Court of Military Appeals, petitioner unsuccessfully sought a stay from that court and from Chief Justice Burger. The court-martial reconvened and petitioner was convicted of 8 of the 14 specifications alleging offenses committed in Alaska and 4 of the 7 specifications alleging offenses committed in New York. These convictions are currently under review by the convening authority pursuant to U. C. M. J., Art. 60, 10 U. S. C. § 860.

Arts. 2, 17, 10 U. S. C. §§802, 817. The Alaska offenses with which petitioner was charged are each described in the U. C. M. J. See n. 1, *supra.* Thus it is not disputed that the court-martial convened in New York possessed the statutory authority to try petitioner on the Alaska child abuse specifications.

In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused. *Gosa* v. *Mayden*, 413 U. S. 665, 673 (1973) (plurality opinion); see *Kinsella* v. *United States ex rel. Singleton*, 361 U. S. 234, 240–241, 243 (1960); *Reid* v. *Covert*, 354 U. S. 1, 22–23 (1957) (plurality opinion); *Grafton* v. *United States*, 206 U. S. 333, 348 (1907); *Johnson* v. *Sayre*, 158 U. S. 109, 114 (1895); *Smith* v. *Whitney*, 116 U. S. 167, 183–185 (1886); *Coleman* v. *Tennessee*, 97 U. S. 509, 513–514 (1879); *Ex parte Milligan*, 4 Wall. 2, 123 (1866); cf. *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 15 (1955); *Kahn* v. *Anderson*, 255 U. S. 1, 6–9 (1921); *Givens* v. *Zerbst*, 255 U. S. 11, 20–21 (1921). This view was premised on what the Court described as the "natural meaning" of Art. I, §8, cl. 14, as well as the Fifth Amendment's exception for "cases arising in the land or naval forces." *Reid* v. *Covert*, *supra*, at 19; *United States ex rel. Toth* v. *Quarles*, *supra*, at 15. As explained in *Kinsella* v. *Singleton*, *supra:*

> "The test for jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.' . . ." *Id.*, at 240–241 (emphasis in original).
>
> "Without contradiction, the materials . . . show that military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense. To say that military jurisdiction 'defies definition in terms of military "status"' is to defy the unambiguous

> language of Art. I, §8, cl. 14, as well as the historical background thereof and the precedents with reference thereto." *Id.*, at 243.

Implicit in the military status test was the principle that determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen was a matter reserved for Congress:

> "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953) (plurality opinion) (footnote omitted).

See also *Coleman* v. *Tennessee*, *supra*, at 514; Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 187 (1962).[3]

In 1969, the Court in *O'Callahan* v. *Parker* departed from the military status test and announced the "new constitutional principle" that a military tribunal may not try a serviceman charged with a crime that has no service connection. See *Gosa* v. *Mayden*, *supra*, at 673. Applying this principle, the *O'Callahan* Court held that a serviceman's off-base sexual assault on a civilian with no connection with the military could not be tried by court-martial. On reexamination of

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[3] One pre-1969 decision of this Court suggests that the constitutional power of Congress to authorize trial by court-martial must be limited to "the least possible power adequate to the end proposed." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 23 (1955) (emphasis deleted). Broadly read, this dictum applies to determinations concerning Congress' authority over the courts-martial of servicemen for crimes committed while they were servicemen. Yet the Court in *Toth* v. *Quarles* was addressing only the question whether an ex-serviceman may be tried by court-martial for crimes committed while serving in the Air Force. Thus, the dictum may be also interpreted as limited to that context.

O'Callahan, we have decided that the service connection test announced in that decision should be abandoned.

The constitutional grant of power to Congress to regulate the Armed Forces, Art. I, § 8, cl. 14, appears in the same section as do the provisions granting Congress authority, *inter alia*, to regulate commerce among the several States, to coin money, and to declare war. On its face there is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section. Whatever doubts there might be about the extent of Congress' power under Clause 14 to make rules for the "Government and Regulation of the land and naval Forces," that power surely embraces the authority to regulate the conduct of persons who are actually members of the Armed Services. As noted by Justice Harlan in his *O'Callahan* dissent, there is no evidence in the debates over the adoption of the Constitution that the Framers intended the language of Clause 14 to be accorded anything other than its plain meaning.[4] Alexander Hamilton described these powers of Congress "essential to the common defense" as follows:

> "These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. . . .
>
> . . . . .
>
> ". . . Are fleets and armies and revenues necessary for this purpose [common safety]? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them." The Federalist No. 23, pp. 152–154 (E. Bourne ed. 1947).

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[4] See *O'Callahan*, 395 U. S., at 277 (Harlan, J., dissenting); 2 M Farrand, The Records of the Federal Convention of 1787, pp. 329–330 (1911); 5 J. Elliot, Debates on the Federal Constitution 443, 545 (1876).

The *O'Callahan* Court's historical foundation for its holding rests on the view that "[b]oth in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion." 395 U. S., at 268. According to the Court, the historical evidence demonstrates that, during the late 17th and 18th centuries in England as well as the early years of this country, courts-martial did not have authority to try soldiers for civilian offenses. The Court began with a review of the 17th-century struggle in England between Parliament and the Crown over control of the scope of court-martial jurisdiction. As stated by the Court, this conflict was resolved when William and Mary accepted the Bill of Rights in 1689, which granted Parliament exclusive authority to define the jurisdiction of military tribunals. See *ibid.* The Court correctly observed that Parliament, wary of abuses of military power, exercised its new authority sparingly.[5] Indeed, a statute enacted by Parliament in 1689 provided for court-martial only for the crimes of sedition, mutiny, and desertion, and exempted members of militia from its scope. Mutiny Act of 1689, 1 Wm. & Mary, ch. 5.

The *O'Callahan* Court's representation of English history following the Mutiny Act of 1689, however, is less than accurate. In particular, the Court posited that "[i]t was . . . the rule in Britain at the time of the American Revolution that a soldier could not be tried for a civilian offense committed in Britain; instead military officers were required to use their energies and office to insure that the accused soldier would be tried before a civil court." 395 U. S., at 269. In making this statement, the Court was apparently referring to Section

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[5] See, *e. g.*, 1 W. Winthrop, Military Law and Precedents 8–9 (2d ed. 1896) (hereinafter Winthrop); G. Nelson & J. Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn. L. Rev. 1, 7–11 (1969) (hereinafter Nelson & Westbrook).

XI, Article I, of the British Articles of War in effect at the time of the Revolution.[6] This Article provided:

> "Whenever any Officer or Soldier shall be accused of a Capital Crime, or of having used Violence, or committed any Offence against the Persons or Property of Our Subjects, . . . the Commanding Officer, and Officers of every Regiment, Troop, or Party to which the . . . accused shall belong, are hereby required, upon Application duly made by, or in behalf of the Party or Parties injured, to use . . . utmost Endeavors to deliver over such accused . . . to the Civil Magistrate." British Articles of War of 1774, reprinted in G. Davis, Military Law of the United States 581, 589 (3d rev. ed. 1915).

This provision, however, is not the sole statement in the Articles bearing on court-martial jurisdiction over civilian offenses. Specifically, Section XIV, Article XVI, provided that all officers and soldiers who

> "shall maliciously destroy any Property whatsoever belonging to any of Our Subjects, unless by Order of the then Commander in Chief of Our Forces, to annoy Rebels or other Enemies in Arms against Us, he or they that shall be found guilty of offending herein shall (besides such Penalties as they are liable to by law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or General Court Martial." *Id.*, at 593.

Under this provision, military tribunals had jurisdiction over offenses punishable under civil law. Nelson & Westbrook

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[6] There is some confusion among historians and legal scholars about which version of the British Articles of War was "in effect" at the time of the American Revolution. Some cite to the Articles of War of 1765 and others to the Articles of War of 1774. Compare, *e. g.*, 2 Winthrop 1448, with J. Horbaly, Court-Martial Jurisdiction 34 (1986) (unpublished dissertation, Yale Law School) (hereinafter Horbaly). For present purposes, however, the two versions of the Articles contain only stylistic differences. In the interest of simplicity, we will refer to the 1774 Articles.

11. Accordingly, the *O'Callahan* Court erred in suggesting that, at the time of the American Revolution, military tribunals in England were available "only where ordinary civil courts were unavailable." 395 U. S., at 269, and n. 11.

The history of early American practice furnishes even less support to *O'Callahan*'s historical thesis. The American Articles of War of 1776, which were based on the British Articles, contained a provision similar to Section XI, Article I, of the British Articles, requiring commanding officers to deliver over to civil magistrates any officer or soldier accused of "a capital crime, . . . having used violence, or . . . any offence against the persons or property of the good people of any of the United American States" upon application by or on behalf of an injured party. American Articles of War of 1776, Section X, Article I, reprinted in 2 Winthrop 1494. It has been postulated that American courts-martial had jurisdiction over the crimes described in this provision where no application for a civilian trial was made by or on behalf of the injured civilian.[7] Indeed, American military records reflect trials by court-martial during the late 18th century for offenses against civilians and punishable under civil law, such as theft and assault.[8]

The authority to try soldiers for civilian crimes may be found in the much-disputed "general article" of the 1776 Articles of War, which allowed court-martial jurisdiction over "[a]ll crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline." American Articles of War of 1776, Section XVIII, Article 5, reprinted in 2 Winthrop 1503.

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[7] See Nelson & Westbrook 14; cf. Duke & Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 Vand. L. Rev. 435, 445–446 (1960) (hereinafter Duke & Vogel).

[8] See *O'Callahan*, 395 U. S., at 278, n. 3 (Harlan, J., dissenting); see also J. Bishop, Justice under Fire 81–82 (1974); Nelson & Westbrook 15; Comment, *O'Callahan* and Its Progeny: A Survey of Their Impact on the Jurisdiction of Courts-Martial, 15 Vill. L. Rev. 712, 719, n. 38 (1970) (hereinafter Comment).

Some authorities, such as those cited by the *O'Callahan* Court, interpreted this language as limiting court-martial jurisdiction to crimes that had a direct impact on military discipline.[9] Several others, however, have interpreted the language as encompassing all noncapital crimes proscribed by the civil law.[10] Even W. Winthrop, the authority relied on most extensively by the majority in *O'Callahan*, recognized that military authorities read the general article to include crimes "committed upon or against *civilians* . . . at or near a military camp or post." 2 Winthrop 1124, 1126, n. 1.

We think the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify the restriction on the plain language of Clause 14 which *O'Callahan* imported into it.[11]

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[9] See 2 Winthrop 1123; Duke & Vogel 446–447.

[10] See, *e. g., Grafton* v. *United States*, 206 U. S. 333, 348 (1907); Hearings before the Senate Committee on Military Affairs, Appendix to S. Rep. No. 130, 64th Cong., 1st Sess., 91 (statement of Brig. Gen. Enoch Crowder).

George Washington also seems to have held this view. When informed of the decision of a military court that a complaint by a civilian against a member of the military should be redressed only in a civilian court, he stated in a General Order dated February 24, 1779:

"All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other." 14 Writings of George Washington 140–141 (J. Fitzpatrick ed. 1936).

[11] The history of court-martial jurisdiction after the adoption of the Constitution also provides little support for *O'Callahan*. For example, in 1800, Congress enacted Articles for the Better Government of the Navy, which provided that "[a]ll offences committed by persons belonging to the navy while on the shore, shall be punished in the same manner as if they had been committed at sea." Act of Apr. 23, 1800, ch. 33, Art. XVII, 2 Stat. 47. Among the offenses punishable if committed at sea were murder, embezzlement, and theft. In addition, the Act also provided that "[i]f any person in the navy shall, when on shore, plunder, abuse, or maltreat any inhabitant, or injure his property in any way, he shall suffer such punishment as a court martial shall adjudge." Art. XXVII, 2 Stat. 48. This

There is no doubt that the English practice during this period shows a strong desire in that country to transfer from the Crown to Parliament the control of the scope of court-martial jurisdiction. And it is equally true that Parliament was chary in granting jurisdiction to courts-martial, although not as chary as the *O'Callahan* opinion suggests. But reading Clause 14 consistently with its plain language does not disserve that concern; Congress, and not the Executive, was given the authority to make rules for the regulation of the Armed Forces.

The *O'Callahan* Court cryptically stated: "The 17th century conflict over the proper role of courts-martial in the enforcement of the domestic criminal law was not, however, merely a dispute over what organ of government had jurisdiction. It also involved substantive disapproval of the general use of military courts for trial of ordinary crimes." 395 U. S., at 268. But such disapproval in England at the time of William and Mary hardly proves that the Framers of the Constitution, contrary to the plenary language in which they conferred the power on Congress, meant to freeze court-martial usage at a particular time in such a way that Congress might not change it. The unqualified language of Clause 14 suggests that whatever these concerns, they were met by vesting in Congress, rather than the Executive, authority to make rules for the government of the military.[12]

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broad grant of jurisdiction to naval courts-martial would suggest that limitations on the power of other military tribunals during this period were the result of legislative choice rather than want of constitutional power.

[12] See, *e. g.*, *O'Callahan*, 395 U. S., at 277 (Harlan, J., dissenting); 1 W. Crosskey, Politics and the Constitution 413–414, 424–426 (1953) (hereinafter Crosskey); Comment 718; but cf. Horbaly 45–56.

The only other basis for saying that the Framers intended the words of Art. I, § 8, cl. 14, to be narrowly construed is the suggestion that the Framers "could hardly have been unaware of Blackstone's strong con-

Given the dearth of historical support for the *O'Callahan* holding, there is overwhelming force to Justice Harlan's reasoning that the plain language of the Constitution, as interpreted by numerous decisions of this Court preceding *O'Callahan*, should be controlling on the subject of court-martial jurisdiction. 395 U. S., at 275–278 (dissenting); cf. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 696 (1978) ("[W]e ought not 'disregard the implications of an exercise of judicial authority assumed to be proper for [100] years'"), quoting *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 307 (1962).

Decisions of this Court after *O'Callahan* have also emphasized that Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. As we recently reiterated, "'[j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'" *Goldman* v. *Weinberger*, 475 U. S. 503, 508 (1986), quoting *Rostker* v. *Goldberg*, 453 U. S. 57, 70 (1981).

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demnation of criminal justice administered under military procedures." Duke & Vogel 449. In his Commentaries, Blackstone wrote:

> "When the nation was engaged in war . . . more rigorous methods were put in use for the raising of armies and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built on no settled principles, but is entirely arbitrary in it's *[sic]* decisions, is . . . something indulged in rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open to all persons to receive justice according to the laws of the land." 1 W. Blackstone, Commentaries *413.

Although we do not doubt that Blackstone's views on military law were known to the Framers, see Crosskey 411–412, 424–425, we are not persuaded that their relevance is sufficiently compelling to overcome the unqualified language of Art. I, § 8, cl. 14.

Since *O'Callahan*, we have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated. See, *e. g.*, *Goldman* v. *Weinberger*, *supra*, at 509–510 (free exercise of religion); *Chappell* v. *Wallace*, 462 U. S. 296, 300–305 (1983) (racial discrimination); *Rostker* v. *Goldberg*, *supra*, at 64–66, 70–71 (sex discrimination); *Brown* v. *Glines*, 444 U. S. 348, 357, 360 (1980) (free expression); *Middendorf* v. *Henry*, 425 U. S. 25, 43 (1976) (right to counsel in summary court-martial proceedings); *Schlesinger* v. *Councilman*, 420 U. S. 738, 753 (1975) (availability of injunctive relief from an impending court-martial); *Parker* v. *Levy*, 417 U. S. 733, 756 (1974) (due process rights and freedom of expression).

The notion that civil courts are "ill equipped" to establish policies regarding matters of military concern is substantiated by experience under the service connection approach. *Chappell* v. *Wallace*, *supra*, at 305. In his *O'Callahan* dissent, Justice Harlan forecasted that "the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the [court-martial] jurisdiction issue." 395 U. S., at 284. In fact, within two years after *O'Callahan*, this Court found it necessary to expound on the meaning of the decision, enumerating a myriad of factors for courts to weigh in determining whether an offense is service connected. *Relford* v. *Commandant, U. S. Disciplinary Barracks*, 401 U. S. 355 (1971). Yet the service connection approach, even as elucidated in *Relford*, has proved confusing and difficult for military courts to apply.[13]

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[13] See Cooper, *O'Callahan* Revisited: Severing the Service Connection, 76 Mil. L. Rev. 165, 186–187 (1977) (hereinafter Cooper); Tomes, The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After *O'Callahan v. Parker*, 25 Air Force L. Rev. 1, 9–35 (1985) (hereinafter Tomes); cf. *United States* v. *Alef*, 3 M. J. 414, 416, n. 4. (Ct. Mil. App. 1977); *United States* v. *McCarthy*, 2 M. J. 26, 29, n. 1 (Ct. Mil. App. 1976).

Since *O'Callahan* and *Relford*, military courts have identified numerous categories of offenses requiring specialized analysis of the service connection requirement. For example, the courts have highlighted subtle distinctions among offenses committed on a military base, offenses committed off-base, offenses arising from events occurring both on and off a base, and offenses committed on or near the boundaries of a base.[14] Much time and energy has also been expended in litigation over other jurisdictional factors, such as the status of the victim of the crime, and the results are difficult to reconcile.[15] The confusion created by the complexity of the service connection requirement, however, is perhaps best illustrated in the area of off-base drug offenses.[16] Soon after *O'Callahan*, the Court of Military Appeals held that drug offenses were of such "special military significance" that their trial by court-martial was unaffected by the decision. *United States* v. *Beeker*, 18 U. S. C. M. A. 563, 565, 40 C. M. R. 275, 277 (1969). Nevertheless, the court has changed its position on the issue no less than two times since *Beeker*, each time basing its decision on *O'Callahan* and *Relford*.[17]

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[14] See, *e. g.*, *United States* v. *Garries*, 19 M. J. 845 (A. F. C. M. R. 1985) (serviceman's on-post murder of wife held service connected), aff'd, 22 M. J. 288 (Ct. Mil. App.), cert. denied, 479 U. S. 985 (1986); *United States* v. *Williamson*, 19 M. J. 617 (A. C. M. R. 1984) (serviceman's off-post sexual offense involving young girl held service connected); *United States* v. *Mauck*, 17 M. J. 1033 (A. C. M. R.) (variety of offenses committed 15 feet from arsenal boundary held service connected), review denied, 19 M. J. 106 (Ct. Mil. App. 1984); *United States* v. *Scott*, 15 M. J. 589 (A. C. M. R. 1983) (serviceman's off-post murder of another serviceman held service connected where crime had its basis in on-post conduct of participants).

[15] Compare *United States* v. *Wilson*, 2 M. J. 24 (Ct. Mil. App. 1976) (off-post robbery and assault of a fellow serviceman held not service connected), and *United States* v. *Tucker*, 1 M. J. 463 (Ct. Mil. App. 1976) (off-post concealment of property stolen from fellow serviceman on-post held not service connected), with *United States* v. *Lockwood*, 15 M. J. 1 (Ct. Mil. App. 1983) (on-post larceny of fellow serviceman's wallet and use of identification cards in it to obtain loan from an off-post business establishment held service connected), and *United States* v. *Shorte*, 18 M. J. 518 (A. F. C. M. R. 1984) (off-post felonious assault committed against fellow serviceman held not service connected).

[16] See Cooper 172–182; Tomes 13–31.

When considered together with the doubtful foundations of *O'Callahan*, the confusion wrought by the decision leads us to conclude that we should read Clause 14 in accord with the plain meaning of its language as we did in the many years before *O'Callahan* was decided. That case's novel approach to court-martial jurisdiction must bow "to the lessons of experience and the force of better reasoning." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–408 (1932) (Brandeis, J., dissenting). We therefore hold that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged.[18] The judgment of the Court of Military Appeals is

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[17] Seven years after *United States* v. *Beeker*, the Court of Military Appeals expressly renounced that decision, holding that *O'Callahan* and *Relford* mandated the conclusion that off-base drug offenses by a serviceman could not be tried by court-martial. See *United States* v. *McCarthy*, *supra; United States* v. *Williams*, 2 M. J. 81, 82 (Ct. Mil. App. 1976); see also *United States* v. *Conn*, 6 M. J. 351, 353 (Ct. Mil. App. 1979); *United States* v. *Alef*, *supra*, at 415–418. Reversing its position again in 1980, the Court of Military Appeals decided that such a restrictive approach was not required under this Court's decisions. *United States* v. *Trottier*, 9 M. J. 337, 340–351 (1980). The court therefore held that "the gravity and immediacy of the threat to military personnel and installations posed by the drug traffic and . . . abuse convince us that very few drug involvements of a service person will not be 'service connected.'" *Id.*, at 351.

United States v. *Trottier*, however, has not settled the confusion in this area. In *Trottier*, the court identified the following exception to its general rule: "[I]t would not appear that use of marijuana by a serviceperson on a lengthy period of leave away from the military community would have such an effect on the military as to warrant the invocation of a claim of special military interest and significance adequate to support court-martial jurisdiction under *O'Callahan*." *Id.*, at 350, n. 28. Since *Trottier*, at least two lower military court decisions have found court-martial jurisdiction over offenses arguably falling within this exception. See *United States* v. *Lange*, 11 M. J. 884 (A. F. C. M. R. 1981), review denied, 12 M. J. 318 (Ct. Mil. App. 1981) (off-post use of marijuana during 6-day leave held sufficient to establish service connection); *United States* v. *Brace*, 11 M. J. 794 (A. F. C. M. R.), review denied, 12 M. J. 109 (Ct. Mil. App. 1981) (off-post use of marijuana during 6-day leave 275 miles from post held sufficient to establish service connection); see also Horbaly 534–535.

Affirmed.

JUSTICE STEVENS, concurring in the judgment.

Today's unnecessary overruling of precedent is most unwise. The opinion of the United States Court of Military Appeals demonstrates that petitioner's offenses were sufficiently "service connected" to confer jurisdiction on the military tribunal. Unless this Court disagrees with that determination—and I would be most surprised to be told that it does—it has no business reaching out to reexamine the decisions in *O'Callahan* v. *Parker*, 395 U. S. 258 (1969), and *Relford* v. *Commandant, U. S. Disciplinary Barracks*, 401 U. S. 355 (1971). While there might be some dispute about the exact standard to be applied in deciding whether to overrule prior decisions, I had thought that we all could agree that such drastic action is only appropriate when essential to the disposition of a case or controversy before the Court.* The fact that any five Members of the Court have the power to reconsider settled precedents at random, does not make that practice legitimate.

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[18] Petitioner argues that the Court of Military Appeals' decision should be reversed because it applies a more expansive subject-matter jurisdiction test to him than had previously been announced. According to petitioner, the exercise of court-martial jurisdiction over him violates his rights under the Due Process Clause of the Fifth Amendment. Our review of the record in this case, however, reveals that petitioner did not raise his due process claim in the Court of Military Appeals. The Court of Military Review, which reinstated the Alaska charges against petitioner, held that military courts had jurisdiction over petitioner's Alaska offenses. Petitioner therefore had an opportunity to raise his due process challenge in the proceedings before the Court of Military Appeals. He has not offered any explanation for his failure to do so. In fact, petitioner, in his reply brief and at oral argument, did not contest the Government's suggestion that he inexcusably failed to raise his due process claim earlier in the proceedings. See Reply Brief for Petitioner 16–19; Tr. of Oral Arg. 36–39. We therefore decline to consider the claim. See, *e. g., Berkemer* v. *McCarty*, 468 U. S. 420, 443 (1984); *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 362 (1981); *United States* v. *Lovasco*, 431 U. S. 783, 788, n. 7 (1977).

For the reasons stated by the Court of Military Appeals, I agree that its judgment should be affirmed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, and with whom JUSTICE BLACKMUN joins in all but the last paragraph, dissenting.

Less than 20 years ago, this Court held in *O'Callahan* v. *Parker*, 395 U. S. 258 (1969), that, to be subject to trial by court-martial, a criminal offense charged against a member of the Armed Forces had to be "service connected," lest the phrase "cases arising in the land or naval forces" in the Fifth Amendment "be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers." *Id.*, at 273. Today the Court overrules *O'Callahan*. In doing so, it disregards constitutional language and principles of *stare decisis* in its singleminded determination to subject members of our Armed Forces to the unrestrained control of the military in the area of criminal justice. I dissent.

I

The majority begins by assuming that the limitation on court-martial jurisdiction enunciated in *O'Callahan* was based on the power of Congress, contained in Art. I, §8, cl. 14, "[t]o make Rules for the Government and Regulation of the land and naval Forces." It then rejects this asserted limitation of congressional power on the ground that the Framers intended to give Congress plenary authority over the

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*Even in its brief proposing the reconsideration of *O'Callahan*, the United States asked the Court to reconsider that decision only in the event that the Court disagrees with the United States' submission that petitioner's acts of sexual assaults on military dependents are service related. Brief for United States 28.

government of the military. But the Court in *O'Callahan* did not simply address whether Art. I, § 8, cl. 14, granted Congress the authority to create court-martial jurisdiction over all crimes committed by members of the Armed Forces. Congress' Article I power to regulate the Armed Forces is limited by the Fifth Amendment right to indictment or presentment by a grand jury and the Sixth Amendment right to trial by jury.[1] "[T]he constitutional grant of power to Congress to regulate the armed forces," this Court has previously stated, "itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 21–22 (1955). The majority simply disregards the limitations the Bill of Rights imposes on the reach of Art. I, § 8, cl. 14.

The rights to grand jury process and to trial by jury are, of course, of restricted application in military cases. The Fifth Amendment excepts from the grand jury requirement "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,"[2] and the

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[1] In any criminal proceeding brought against petitioner by the State of Alaska, the federal grand jury right would not attach; the Sixth Amendment right would apply by virtue of the Fourteenth Amendment. Whether petitioner would have these rights in any prosecution by a dual sovereign is not at issue here, however. The sole question is whether the Federal Government, when it proceeded against petitioner, was obliged to provide those safeguards guaranteed by the Fifth and Sixth Amendments. See *Grafton* v. *United States*, 206 U. S. 333, 352–354 (1907).

[2] The language of this exception could be understood to mean that "cases arising in the land or naval forces," as well as in the militia, are only excepted from the requirement of grand jury indictment or presentment "in actual service in time of War or public danger." This Court, however, has interpreted the "time of war" provision as referring only to cases arising in the militia, not the land or naval forces. *Johnson* v. *Sayre*, 158 U. S. 109, 114 (1895). I am not convinced this reading of the Fifth Amendment is correct, but need not rely on a different interpretation here.

Court has held this exception applicable to the Sixth Amendment right to trial by jury as well. *Ex parte Milligan*, 4 Wall. 2, 123 (1867). But the text of the exception is inconsistent with the majority's conclusion that the only relevant factor in determining whether a court-martial has jurisdiction over a case is the status of the defendant as a member of the Armed Services.[3]

The Fifth Amendment's exception covers only "*cases arising in* the land and naval forces" (emphasis added). It makes no reference to the *status* of the individual committing the crime. Had that been the Framers' intent, it would have been easy to have said so, given that the grand jury provision of the Amendment, which states that "[n]o Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," speaks not in terms of "crimes" or "cases," but of individual defendants. Nonetheless, the exception contained in the Fifth Amendment is expressed—and applies by its terms—only to *cases arising in* the Armed Forces. *O'Callahan* addressed not whether Art. I, § 8, cl. 14, empowered Congress to create court-martial jurisdiction over all crimes committed by service members, but rather whether Congress, in exercising that power, had encroached upon the rights of members of Armed Forces whose cases did not "arise in" the Armed Forces. This is clear from the Court's statement of its holding in *O'Callahan:*

> "We have concluded that the crime to be under military jurisdiction must be service connected, lest 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every

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[3] "This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning." *Reid* v. *Covert*, 354 U. S. 1, 8, n. 7 (1957) (plurality opinion).

member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers." 395 U. S., at 272–273 (footnote omitted).[4]

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[4] See also *Relford* v. *Commandant, U. S. Disciplinary Barracks*, 401 U. S. 355, 362–363 (1971); *Gosa* v. *Mayden*, 413 U. S. 665, 672–673 (1973).

The majority contends that, before *O'Callahan*, this Court had held consistently that status as a member of the Armed Forces was an adequate basis for the assertion of court-martial jurisdiction. *Ante*, at 439. But a number of the precedents cited dealt with the assertion of court-martial jurisdiction over individuals who were not members of the Armed Forces and therefore, this Court ruled, did not come within the reach of Art. I, § 8, cl. 14. See *Kinsella* v. *United States ex rel. Singleton*, 361 U. S. 234, 246–248 (1960) (military dependent in noncapital case); *Reid* v. *Covert*, *supra*, at 19–23 (plurality opinion) (military dependent in capital case); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 14–15 (1955) (discharged veteran); see also *Grisham* v. *Hagan*, 361 U. S. 278 (1960) (civilian military employee in capital case); *McElroy* v. *United States ex rel. Guagliardo*, 361 U. S. 281, 286 (1960) (civilian military employee in noncapital case). Having disposed of these cases on the threshold issue of the reach of the congressional power created by Art. I, § 8, cl. 14, the Court did not consider the limits imposed on the Article I power by the Fifth Amendment.

Several of the remaining cases cited involved crimes committed in the course of the performance of military duties that therefore clearly arose in the Armed Forces. See *Grafton* v. *United States*, *supra* (murder by Army private serving sentry duty on post); *Johnson* v. *Sayre*, *supra* (embezzlement of United States funds intended for the Naval service); *Smith* v. *Whitney*, 116 U. S. 167 (1886) (fraud on Navy contracts). In *Smith*, the Court concluded that "such conduct of a naval officer is a case arising in the naval forces, and therefore punishable by court martial under the articles and regulations made or approved by Congress in the exercise of the powers conferred upon it by the Constitution, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces, without indictment or trial by jury." *Id.*, at 186.

The remaining cases cited by the majority are similarly inapposite. *Coleman* v. *Tennessee*, 97 U. S. 509 (1879), dealt with a murder committed by a soldier in time of war. In *Ex parte Milligan*, 4 Wall. 2 (1867), any reference to the reach of court-martial jurisdiction over persons in the Armed Services was dictum, since the holding of that case was that a civilian was improperly subjected to military jurisdiction during the Civil War in a State which had "upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.*, at 121.

The protections afforded individuals by the Fifth and Sixth Amendments are central to our constitutional scheme of justice. The right to trial by jury, in particular, "ranks very high in our catalogue of constitutional safeguards." *United States ex rel. Toth* v. *Quarles*, 350 U. S., at 16. These protections should not be lightly abrogated. Consequently, the exception in the Fifth Amendment for cases arising in the Armed Forces must be strictly construed. This was the basis for the Court's conclusion, in *Toth*, that the power to authorize trial by court-martial should be limited to "'the least possible power adequate to the end proposed.'" *Id.*, at 23 (emphasis omitted), quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821).

The historical evidence considered by the Court in *O'Callahan* is therefore relevant, not to what the Framers intended to include in the scope of the congressional power to regulate the Armed Forces in Art. I, § 8, cl. 14, but to what the Framers, wary of military jurisdiction and familiar with strong restrictions on the scope of that jurisdiction, considered "cases arising in the armed forces." Even assuming that they intended to assign control over the scope of the Article I power to the Legislature, this does not imply that the meaning of the Fifth Amendment's "arising in" exception can be interpreted without reference to the practices of that time.

In that respect it is significant that the British political and legal writing of the 17th and 18th centuries demonstrates a longstanding suspicion of broad court-martial jurisdiction. This suspicion was well known in colonial America, and was based on familiar history.[5] British writers and legislators

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[5] This attitude is evident in the Petition of Right in 1627, in which the two Houses of Parliament joined in a petition to the Crown to redress four major grievances, the last of which was the trial of soldiers by military commissions. See J. Tanner, English Constitutional Conflicts of the Seventeenth Century 61–62 (1983 reprint). The pertinent portion of the Petition stated:

"VII. [W]hereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and took a narrow view of the appropriate scope of court-martial jurisdiction, which manifested itself in a very limited grant of authority to try offenses by court-martial during the period of which the Framers would have been most acutely aware. See, *e. g.*, M. Hale, The History of the Common Law of England 42–43 (6th ed. 1820). Not only was that jurisdiction narrow, it was expressly limited to cases having some connection with the military. The test was not one of status, but one of military relationship. See S. Adye, A Treatise on Courts Martial 60 (1786) ("The crimes that are cognizable by a court martial, as repugnant to military discipline, are pointed out by the mutiny act and articles of war . . . and as to other crimes which officers and soldiers being guilty of, are to be tried for by the ordinary course of law, in like manner with other subjects"); see also 1 C. Clode, Military Forces of the Crown; Their Administration and Government 158

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statutes of this your realm: nevertheless of late time divers commissions . . . have issued forth . . . according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny or other outrage or misdemeanor whatsoever; and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial:

"VIII. By pretext whereof some of your Majesty's subjects have been by some of the said Commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to have been judged and executed." 3 Car. I, ch. 1.

The petition, which prayed revocation of the military commissions, ultimately received royal assent. Tanner, *supra*, at 64.

The Mutiny Act of 1689, 1 Wm. & Mary, ch. 5, went further, providing that "no man may be forejudged of Life or Limb, or subjected to any kind of Punishment by Martial Law, or in any other manner then by the Judgment of his Peers, and according to the known and established Laws of this Realm," limiting this provision only with respect to "Soldiers who shall Mutiny or Stir up Sedition, or shall Defect Their Majesties Service," who might "be brought to a more exemplary and speedy punishment than the usual forms of Law will allow."

(1869) ("It has been a subject of controversy to distinguish the offences that are purely Military (and therefore properly within the cognizance of a Court-martial), from others that are Civil or Political (and therefore properly within the cognizance of the civil tribunals of the community)"); *Grant* v. *Gould*, 2 H. Bl. 69, 99–100, 126 Eng. Rep. 434, 450 (C. P. 1792) ("In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law; but where they are ordinary offences against the civil peace they are tried by the common law courts. . . . The object of the mutiny act . . . is to create a court invested with authority to try those who are a part of the army . . . and the object of the trial is limited to breaches of military duty") (emphasis omitted). The reach of military law in Britain at the time of the Revolution thus permitted courts-martial only for offenses committed by members of the Armed Forces that had some connection with their military service.

The majority disputes the *O'Callahan* Court's suggestion that the British Articles of War forbade the trial of civil offenses by court-martial. The Court points to Section XIV, Article XVI, of the British Articles of War of 1774, reprinted in G. Davis, Military Law of the United States 581, 593 (3d rev. ed. 1915), which provided:

> "All Officers and Soldiers are to behave themselves orderly in Quarters, and on their March; and whosoever shall commit any Waste or Spoil either in Walks of Trees, Parks, Warrens, Fish Ponds, Houses or Gardens, Corn Fields, Inclosures or Meadows, or shall maliciously destroy any Property whatsoever belonging to any of Our Subjects, unless by order of the then Commander in Chief of Our Forces, to annoy Rebels or other Enemies in Arms against Us, he or they that shall be found guilty of offending herein shall (besides such Penalties as they are liable to by law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or General Court Martial."

The majority contends that this provision counters any argument that court-martial jurisdiction in Britain at the time of the American Revolution was in any respect limited to offenses not punishable by civil law. *Ante*, at 443. The latter provision, however, appears in a section of the Articles of War captioned "Of Duties in Quarters, in Garrison, or in the Field," and its text suggests that the activities it forbade were considered derelictions of *military* duty, and were punishable by court-martial on that basis.[6]

American colonists shared the British suspicion of broad military authority in courts-martial. One of the grievances stated in the Declaration of Independence was King George III's assent to "pretended Legislation: For quartering large bodies of armed troops among us: For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States." The Framers thus were concerned both with protecting the rights of those subjected to courts-martial, and with preventing courts-martial from permitting soldiers to get away with murder—literally—in the civilian community. This "known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts," *Coleman* v. *Tennessee*, 97 U. S. 509, 514 (1879), makes it unlikely that the Framers considered any crime committed by a member of the Armed Forces, regardless of its lack of connection to military service, to give rise to a "case arising in" the Armed Forces of the new Nation.[7]

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[6] See also G. Davis, Military Law of the United States 437 (3d rev. ed. 1915) ("The acts of trespass, etc., indicated in this Article are made punishable as special breaches of discipline, and less for the protection of citizens than for the maintenance of the orderly behavior and morale of the military force") (emphasis omitted); 2 W. Winthrop, Military Law and Precedents 1022 (1896) ("This Article, which, dating from an early period of the British law, first appeared in our code in the Articles of 1776, is designed, by making severely punishable trespasses committed by soldiers on the march or otherwise, to prevent straggling and maintain order and discipline in military commands, while at the same time availing to secure from intrusion and injury the premises and property of the inhabitants") (footnotes omitted).

This is borne out by provisions in the American Articles of 1776 that are comparable to those in the British Articles of War of 1774. See Section X, Article I, reprinted in 2 W. Winthrop, Military Law and Precedents 1494 (1896); Section XIII, Article 16, reprinted in 2 Winthrop, *supra*, at 1497; Section XVIII, Article 5, reprinted in 2 Winthrop, *supra*, at 1503. The provisions created military offenses where the crimes involved were service connected. This tradition continued after the adoption of the Constitution. With respect to the 1874 Articles of War, for example, Davis wrote:

> "As to whether an act which is a civil crime is also a military offense no rule can be laid down which will cover all cases, for the reason that what may be a military offense under certain circumstances may lose that character under others. . . . But if the act be committed on a military reservation, or other ground occupied by the army, or in its neighborhood, so as to be in the constructive presence of the army; or if committed while on duty, particularly if the injury be to a member of the community whom it is the offender's duty to protect; or if com-

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[7] But cf. Cong. Globe, 37th Cong., 3d Sess., 953 (1863).

The Court contends that "American military records reflect trials by court-martial during the late 18th century for offenses against civilians and punishable under the civil law, such as theft and assault." *Ante*, at 444. It apparently bases this conclusion on materials provided to the *O'Callahan* Court by the United States. See Brief for United States in *O'Callahan* v. *Parker*, O. T. 1968, No. 646, pp. 35–52, summarizing courts-martial during the period from 1775 to 1815 involving "apparently non-military criminal offenses committed by military personnel." *Id.*, at 35. I agree with the *O'Callahan* Court that, to the extent the courts-martial described there did not appear to deal with crimes that were committed during wartime, were committed by officers, or involved special military interests, the descriptions of the crimes "simply recite the offender and the offense and give no basis for judging the relationship of the offense to military discipline." *O'Callahan* v. *Parker*, 395 U. S. 258, 270, n. 14 (1969).

> mitted in the presence of other soldiers, or while in uniform; or if the offender use his military position, or that of another, for the purpose of intimidation or other unlawful influence or object—such facts would be sufficient to make it prejudicial to military discipline . . . ." Davis, *supra*, at 476.

Viewed historically, then, *O'Callahan*'s recognition of the service connection requirement did not signify a meaningful change in what could be tried in courts-martial. Quite the reverse: not until the enactment of the Uniform Code of Military Justice in *1950* did Congress attempt to give courts-martial the authority to try the crimes of murder and rape committed in peacetime within the United States. See Duke & Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 12 Vand. L. Rev. 435, 452–453 (1960). Common-law felonies in peacetime were only brought within the court-martial jurisdiction in 1916. Wiener, Courts-Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. Rev. 1, 10–12 (1958). The Framers' conception of what could properly be tried in a court-martial must have informed their understanding of what cases arise in the Armed Forces, thus permitting what would otherwise be unconstitutional infringements of Fifth and Sixth Amendment rights. The relatively recent expansion of the authority of military tribunals appears to disregard the Framers' understanding.

Instead of acknowledging the Fifth Amendment limits on the crimes triable in a court-martial, the Court simply ignores them. But "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government." *Reid* v. *Covert*, 354 U. S. 1, 14 (1957) (plurality opinion). The limitations may not, in the view of the majority, be desirable, but that does not mean they do not exist.

The requirement of service connection recognized in *O'Callahan* has a legitimate basis in constitutional language and a solid historical foundation. It should be applied in this case.

II

Application of the service connection requirement of *O'Callahan*, as further elaborated in *Relford* v. *Commandant, U. S. Disciplinary Barracks*, 401 U. S. 355 (1971), demonstrates that petitioner's Alaska crimes do not have an adequate service connection to support the exercise of court-martial jurisdiction. Petitioner's offenses did not detract from the performance of his military duties. He committed these crimes while properly absent from his unit, and there was no connection between his assigned duties and his crimes. Nor did petitioner's crimes threaten people or areas under military control. The crimes were committed in petitioner's private home in the civilian community in Juneau, where there is not even a base for Coast Guard personnel. Petitioner's acts were not likely to go unpunished; the court-martial judge determined that the offenses were of a type traditionally prosecuted by civilian courts, that such courts were available, and that, while the Alaska courts had deferred prosecution in light of the court-martial proceeding, the State had not declined to prosecute the offenses. Nor did the crimes implicate any authority stemming from the war power; they were committed within the territorial United States while the Nation was at peace.

Moreover, the crimes caused no measurable interference with military relationships. Though the victims were dependents of Coast Guard members, the court-martial judge found that there was only *de minimis* military interaction between petitioner and the fathers of the victims, and that the relationships between petitioner and the families of the victims "were founded primarily upon the ages and activities of the children and additionally upon common sporting interests, common spousal interest and employment and neighborly relationships," App. to Pet. for Cert. 58a, rather than the connection of petitioner and the families through the Coast Guard.[8] Because the crimes did not take place in an area within military control or have any effect on petitioner's military duties, their commission posed no challenge to the maintenance of order in the local command. The military judge found that the Government had not demonstrated any impact of the offenses on "morale, discipline, [or] the reputation or the integrity of the Coast Guard in Juneau." The only connection between the military and the offenses at issue was the fact that the victims were military dependents. But the military judge found explicitly that the military association of petitioner and the victims' fathers did not facilitate petitioner's crimes,[9] and that "[t]he impact apparent in this case, that is, on the parents and the victims themselves is no different than that which would be produced by [a] civilian perpetrator." *Id.*, at 57a.

The military judge, after properly reviewing the *Relford* factors, concluded correctly that they did not render petitioner's offenses service connected and dismissed the charges. Engaging in what can only be described as impermissible appellate factfinding,[10] the Coast Guard Court of Military

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[8] See also 21 M. J. 512, 514 (C. G. C. M. R. 1985) ("A friendship had grown between the accused and both of the other families, grounded in one case, on the common sporting interests of bowling and basketball, and, in the other, on the proximity of living next door. The alleged victims came to the accused's home on a regular basis to visit with his two sons. Both girls at one time played on a soccer team coached by the accused and they also bowled in a league in which the accused was active").

[9] See the military judge's Supplemental Essential Findings of Fact, App. to Pet. for Cert. 62a ("To the extent that trust had a bearing on the opportunity for the alleged offenses, that trust arose out of friendships between the Solorio and Johnson and Solorio and Grantz families and not out of the respective fathers *[sic]* common association as members of the U. S. Coast Guard. The trust placed in a servicemember in general, and in the accused in particular, by virtue of status as a member of the Coast Guard was minimal and had no direct relationship to the offenses alleged").

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[10] The appeal to the Court of Military Review was brought under Article 62, Uniform Code of Military Justice, 10 U. S. C. § 862 (1982 ed., Supp. III). Section 862(b) provides that "[i]n ruling on an appeal under this section, the Court of Military Review may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c))." Title 10 U. S. C. 866(c), Article 66(c) of the Uniform Code of Military Justice, authorizes the Court of Military Review, in acting on findings of guilty and sentences, to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." See also *United States* v. *Burris*, 21 M. J. 140, 143–144 (Ct. Mil. App. 1985).

While the Court of Military Review acknowledged that it was bound by facts found at the trial level unless those findings were incorrect as a matter of law, 21 M. J., at 515, 517, it nonetheless proceeded to assume the facts necessary to its conclusion that the impact on the Coast Guard community at Governors Island created the requisite service connection to justify the exercise of court-martial jurisdiction. One judge on the Court of Military Review, dissenting in part from the court's ruling, rejected the majority's approach:

"Where I depart from the majority is the holding that there was 'service connection' and therefore jurisdiction, in this case, as a matter of law. . . . [T]he [military] judge made no specific findings with respect to the possible effect of the offenses at Governors Island or on personnel under the authority and responsibility of the convening authority. Even if this case were before us for review under Article 66(c), U. C. M. J., 10 U. S. C. § 666(c), I would hesitate to determine that jurisdiction exists in light of this omission. . . . Since this case is before us for review under Article 62(b) U. C. M. J., 10 U. S. C. § 862(b), I do not believe we are empowered to cure an omission from the essential findings of the trial judge." *Id.*, at 523 (Bridgman, J., concurring in part and dissenting in part).

Judge Bridgman would have remanded without prejudice to the accused's right to renew his attack on the jurisdiction of the court-martial. *Ibid.*

The Court of Military Appeals suggested broadly that the Court of Military Review had violated its obligations under Article 62 in this case, but concluded that the violation was immaterial. See 21 M. J. 251, 254 (1986) ("A military judge's factfinding power under Article 62 cannot be superseded by a Court of Military Review in an appeal under Article 62 . . . . To some extent the Court of Military Review may have erred in this direc-

Review reversed the dismissal. 21 M. J. 512 (1985). It concluded that the military judge's finding that the offenses had had no impact on morale or discipline was erroneous because the judge should have considered the effect the offenses would have had on the community in Juneau had they come to light while the victims and their families were still in Alaska, and the impact of the offenses on morale and discipline at Governors Island. Without remanding for further factfinding, the court held that the Alaska offenses had a direct impact upon the good order, discipline, morale, and welfare of Coast Guard personnel at Governors Island. *Id.*, at 519. It further asserted, again without basis in the facts found by the military judge, that the Coast Guard's interest in deterring the offenses was greater than that of the civilian authorities, and that the concerns of the victims' parents would have been different had the offender been a civilian. *Id.*, at 519–520. On the basis of these newly found facts, the Court of Military Review held petitioner's crime sufficiently service connected to justify the exercise of court-martial jurisdiction. *Id.*, at 522.

The Court of Military Appeals affirmed. 21 M. J. 251 (1986). While conceding that its "precedents involving off-base sex offenses against civilian dependents of military personnel would point to a different conclusion," *id.*, at 254, it concluded that a "recent development in our society"—specifically, an increase in concern for the victims of crimes—meant that sex offenses committed against young children of members of the military, which would have "a continuing effect on the victims and their families," *id.*, at 256, sufficed to establish service connection.

The military judge's straightforward application of *O'Callahan* and *Relford* was plainly correct given the facts as he found them, facts that the reviewing courts have not demonstrated to have been clearly erroneous. The Court of Mili-

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tion; but any such error is immaterial, because on the basis of indisputed facts, we conclude that the offenses in Alaska were service-connected").

tary Appeals' apparent conclusion that serious or disturbing crimes committed upon military dependents sufficed to create court-martial jurisdiction ignored this Court's prior decisions.

The majority asserts that "the service connection approach, even as elucidated in *Relford*, has proved confusing and difficult for military courts to apply." *Ante*, at 448. It is true that the test requires a careful, case-specific factual inquiry. But this is not beyond the capacity of the military courts. Indeed, the military judge in this case engaged in a thorough and thoughtful application of the *Relford* factors. It should not be surprising that such determinations may at times be difficult or time consuming or require the drawing of narrow distinctions. The trial of any person before a court-martial encompasses a deliberate decision to withhold procedural protections guaranteed by the Constitution. Denial of these protections is a very serious matter. The Framers declined to draw an easy line, like that established by the Court today, which would sweep an entire class of Americans beyond the reach of the Bill of Rights. Instead, they required that the protections of the Fifth and Sixth Amendments be applied in any case not "arising in" the Armed Forces. This requirement must not be discarded simply because it may be less expeditious than the majority deems appropriate.

III

O'Callahan v. *Parker* remains correct and workable today. The Court nonetheless insists on reopening a question which was finally and properly resolved in 1969. In doing so, it shows a blatant disregard for principles of *stare decisis*, and makes more dubious the presumption "that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). This in turn undermines "the integrity of our constitutional system of government, both in appearance and in fact."

Ibid.; see also *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 663 (1895) (Harlan, J., dissenting).

The Court's willingness to overturn precedent may reflect in part its conviction, frequently expressed this Term, that members of the Armed Forces may be subjected virtually without limit to the vagaries of military control. See *United States* v. *Stanley*, *post*, p. 669; *United States* v. *Johnson*, 481 U. S. 681 (1987). But the Court's decision today has, potentially, the broadest reach of any of these cases. Unless Congress acts to avoid the consequences of this case, every member of our Armed Forces, whose active duty members number in the millions, can now be subjected to court-martial jurisdiction—without grand jury indictment or trial by jury—for *any* offense, from tax fraud to passing a bad check, regardless of its lack of relation to "military discipline, morale and fitness." *Schlesinger* v. *Councilman*, 420 U. S. 738, 761, n. 34 (1975). Today's decision deprives our military personnel of procedural protections that are constitutionally mandated in trials for purely civilian offenses. The Court's action today reflects contempt, both for the members of our Armed Forces and for the constitutional safeguards intended to protect us all. I dissent.

WELCH *v.* TEXAS DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-1716. Argued March 4, 1987—Decided June 25, 1987

Petitioner, an employee of the Texas Highways Department, was injured while working on a ferry dock operated by the Department. She filed suit against the Department and the State under § 33 of the Jones Act, which provides that any seaman injured in the course of his employment may maintain an action for damages at law in federal district court, and which, in effect, applies the remedial provisions of the Federal Employer's Liability Act (FELA) to such suits. The District Court dismissed the action as barred by the Eleventh Amendment, and the Court of Appeals affirmed. Although recognizing that *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184, held that an employee of a state-operated railroad may bring an FELA action in federal court, the Court of Appeals held that the decision was inapplicable in light of Congress' failure to include in the Jones Act an unmistakably clear expression of its intention to abrogate the States' Eleventh Amendment immunity from suit in federal court. The court also held that Texas had not consented to being sued under the Jones Act.

Held: The judgment is affirmed.

780 F. 2d 1268, affirmed.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR, concluded that the Eleventh Amendment bars a state employee from suing the State in federal court under the Jones Act. Pp. 472–495.

(a) Even though the express terms of the Eleventh Amendment's prohibition are limited to federal-court suits "in law or equity" against a State by citizens of another State or a foreign country, the Amendment bars a citizen from suing his own State, *Hans* v. *Louisiana*, 134 U. S. 1, and prohibits admiralty suits against a State, *Ex parte New York, No. 1*, 256 U. S. 490, unless the State expressly waives its immunity and consents to suit in federal court. Moreover, assuming that Congress can abrogate the Eleventh Amendment when it acts pursuant to the Commerce Clause, it must express its intent to do so in unmistakable language in the statute itself. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234. Pp. 472–474.

(b) Congress has not expressed in unmistakable statutory language its intention to allow States to be sued in federal court under the Jones Act. Although the Act extends to "*[a]ny*" injured seaman, this general authorization for federal-court suits is not the kind of unequivocal statutory language that is sufficient to abrogate the Eleventh Amendment, which marks a constitutional distinction between the States and other employers of seamen. Moreover, since both lower courts rejected petitioner's contention that Texas waived its Eleventh Amendment immunity, and since the petition for certiorari does not address this issue, it need not be considered here. Pp. 474–476.

(c) To the extent that *Parden* is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled. Pp. 476–478.

(d) *Hans,* which firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity, and the long line of subsequent cases that reaffirmed that principle, will not be overruled in the absence of "special justification" for such a departure from the doctrine of *stare decisis.* The argument that the Amendment does not bar citizens' federal-question actions against the States in federal court is not persuasive for several reasons. The historical records show that, at most, the intentions of the Constitution's Framers and Ratifiers were ambiguous on the subject. Moreover, since federal-question actions unquestionably are "suits in law or equity," the plain language of the Amendment refutes the argument. Nor does the argument offer any satisfactory explanation for the overwhelming rejection of another amendment that would have allowed citizen suits against States for causes of action arising under treaties. The principle of sovereign immunity has been deeply embedded in our federal system since its inception, and is required because of the sensitive problems inherent in making one sovereign appear against its will in the courts of another. That States may not be sued absent waiver or congressional enactment is a necessary consequence of their role in a system of dual sovereignties. Pp. 478–488.

(e) The argument that the sovereign immunity doctrine has no application to citizens' admiralty suits against unconsenting States in federal courts is directly contrary to long-settled authority, including *Ex parte New York, No. 1.* The suggestion that the latter case overruled settled law allowing such suits is not supported by the earlier cases cited, which, on balance, indicate that unconsenting States were immune from admiralty suits, and, at the very least, demonstrate that the question was not "settled." Pp. 488–493.

JUSTICE SCALIA concluded that, regardless of the correctness of *Hans* as an original matter, Congress enacted the Jones Act and the FELA provisions which it incorporates on the assumption that, as *Hans* appears to have held, Article III of the Constitution contains an implicit limitation on suits brought by individuals against States. The statutes cannot now be read to apply to States as though that assumption never existed. Thus, *Parden* is properly overruled. Pp. 495–496.

POWELL, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C. J., and WHITE and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 495. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 495. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 496.

Michael D. Cucullu argued the cause and filed a brief for petitioner.

F. Scott McCown, Special Assistant Attorney General of Texas, argued the cause for respondents. With him on the brief were *Jim Mattox*, Attorney General, *Mary F. Keller*, Executive Assistant Attorney General, and *Dudley Fowler*, Assistant Attorney General.*

JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join.

The question in this case is whether the Eleventh Amendment bars a state employee from suing the State in federal court under the Jones Act, ch. 250, 41 Stat. 1007, 46 U. S. C. §688.

I

The Texas Department of Highways and Public Transportation operates a free automobile and passenger ferry be-

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**Robert M. Weinberg, Julia Penny Clark, David M. Silberman, Laurence Gold,* and *George Kaufmann* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Benna Ruth Solomon, Beate Bloch, and *Clifton S. Elgarten* filed a brief for the Council of State Governments et al. as *amici curiae* urging affirmance.

tween Point Bolivar and Galveston, Texas. Petitioner Jean Welch, an employee of the State Highway Department, was injured while working on the ferry dock at Galveston. Relying on § 33 of the Jones Act, 46 U. S. C. § 688, she filed suit in the Federal District Court for the Southern District of Texas against the Highway Department and the State of Texas.[1]

The District Court dismissed the action as barred by the Eleventh Amendment. 533 F. Supp. 403, 407 (1982). A divided panel of the Court of Appeals for the Fifth Circuit reversed, with each judge writing separately. 739 F. 2d 1034 (1984). On rehearing en banc, the Court of Appeals affirmed the judgment of the District Court. 780 F. 2d 1268 (1986). The court recognized that *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184 (1964), held that an employee of a state-operated railroad company may bring an action in federal court under the Federal Employers' Liability Act (FELA), 53 Stat. 1404, 45 U. S. C. §§ 51–60. *Parden* is relevant to this case because the Jones Act applied the remedial provisions of the FELA to seamen. See 46 U. S. C. § 688(a). The court nevertheless concluded that "the broad sweep of the *Parden* decision, although it has not been overruled, has overtly been limited by later decisions as its full implications have surfaced." 780 F. 2d, at 1270. The court relied on our holding that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hospital* v.

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[1] Section 33 of the Jones Act provides in part:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 U. S. C. § 688(a).

Scanlon, 473 U. S. 234, 242 (1985).[2] The Court of Appeals found no unmistakable expression of such an intention in the Jones Act. The court also held that Texas has not consented to suit under the Jones Act. 780 F. 2d, at 1273–1274 (citing *Lyons* v. *Texas A & M University*, 545 S. W. 2d 56 (Tex. Civ. App. 1976), writ refused, n.r.e. We granted certiorari, 479 U. S. 811 (1986), and now affirm.

II

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Court has recognized that the significance of the Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III" of the Constitution. *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 98 (1984) *(Pennhurst II)*. Accordingly, as discussed more fully in Part V of this opinion, the Court long ago held that the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State. *Hans* v. *Louisiana*, 134 U. S. 1, 10 (1890). See *Edelman* v. *Jordan*, 415 U. S. 651, 662–663 (1974); *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 280 (1973). For the same reason, the Court has held that the Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, "suits in law or equity." *Ex parte New York, No. 1*, 256 U. S. 490, 497 (1921) (Eleventh Amendment bars *in personam* actions against a State by its citizens); *Ex parte New York, No. 2*, 256 U. S. 503 (1921) (Eleventh Amendment bars actions *in rem* against vessel owned by the State and employed exclusively for governmental purposes). See *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670, 683, n. 17 (1982) (plurality opinion of STEVENS, J.); *id.*, at 706–710 (WHITE, J., concurring in judgment in part and dissenting in part). See *infra*, at 488–490.[3]

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[2] The question in *Scanlon* was whether § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794, makes state agencies subject to suits for retroactive monetary relief in federal court. The Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 244–245, n. 4 (1985). Congress therefore had the power to subject unconsenting States to suit in federal court. See *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976).

The Court has recognized certain exceptions to the reach of the Eleventh Amendment. If a State waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment. *Clark* v. *Barnard*, 108 U. S. 436, 447 (1883). But, because "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," *Edelman* v. *Jordan*, 415 U. S., at 673, the Court will find a waiver by the State "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Ibid.* (quoting *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171 (1909)). Moreover, "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst II*, 465 U. S., at 99 (emphasis in original). Thus, a State does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts. *Id.*, at 99, n. 9.

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[3] In *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982), eight Members of the Court agreed that the Eleventh Amendment bars suits in admiralty brought to recover damages from the State or its officials. *Id.*, at 698–699 (plurality opinion of STEVENS, J.); *id.*, at 706–710 (WHITE, J., concurring in judgment in part and dissenting in part). An action under the Jones Act unquestionably is an action to recover damages from the State.

We also have recognized that the Eleventh Amendment "necessarily [is] limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456 (1976). Consequently, Congress can abrogate the Eleventh Amendment without the States' consent when it acts pursuant to its power "'to enforce, by appropriate legislation' the substantive provisions of the Fourteenth Amendment." *Ibid.* (quoting U. S. Const., Amdt. 14, § 5). As the Court of Appeals noted in this case, we have required that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 243. We have been unwilling to infer that Congress intended to negate the States' immunity from suit in federal court, given "the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst II*, *supra*, at 99. Moreover, the courts properly are reluctant to infer that Congress has expanded our jurisdiction. See *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, 17 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation").

III

We now apply these principles to the Jones Act. We note that the question whether the State of Texas has waived its Eleventh Amendment immunity is not before us. Both the District Court and the Court of Appeals held that the State has not consented to Jones Act suits in federal court. The petition for certiorari does not address this issue, and we do not regard it as fairly included in the questions on which certiorari was granted.[4] Indeed, at oral argument counsel for

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[4] The questions presented in the petition for certiorari are:

"1. Whether the State Department of Highways and the State of Texas are immune from a Jones Act suit in U. S. District Court by a state petitioner conceded that the question of express waiver by the State "is not before the Court . . . ." Tr. of Oral Arg. 18. We therefore have no occasion to consider petitioner's argument in her brief on the merits that the Texas Tort Claims Act, Tex. Rev. Civ. Stat. Ann., Art. 6252-19 (Vernon, 1970, as amended 1973 Tex. Gen. Laws, ch. 50) constitutes an express waiver of the State's Eleventh Amendment immunity. Brief for Petitioner 29-34. We accept the holdings of the Court of Appeals and the District Court that it does not.

Petitioner's remaining argument is that Congress has abrogated the States' Eleventh Amendment immunity from suit under the Jones Act. We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to §5 of the Fourteenth Amendment. See *County of Oneida* v. *Oneida Indian Nation of New York*, 470 U. S. 226, 252 (1985).[5] Petitioner's argument fails in any event because Congress has not expressed in unmistakable statutory language its intention to allow States to be sued in federal court under the Jones Act. It is true that the Act extends to "*[a]ny* seaman who shall suffer personal injury in the course of his employment," §33 (emphasis added). But the Eleventh Amendment marks a constitutional distinction between the States and other employers of

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employee/seaman by operation of the Eleventh Amendment to the U. S. Constitution.

"2. Whether the doctrine of implied waiver of sovereign immunity as set forth in *Parden* v. *Terminal R. R. Co.*, 377 U. S. 184 (1964) is still viable." Pet. for Cert. i (parallel citations omitted).

[5] The argument for such an authority starts from the proposition that the Constitution authorizes Congress to regulate matters within the admiralty and maritime jurisdiction, either under the Commerce Clause or the Necessary and Proper Clause. See D. Robertson, Admiralty and Federalism 142-145 (1970). By ratifying the Constitution, the argument runs, the States necessarily consented to suit in federal court with respect to enactments under either Clause.

seamen. Because of the role of the States in our federal system, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hospital* v. *Scanlon, supra*, at 246. See *Quern* v. *Jordan*, 440 U. S. 332, 342 (1979). See also *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S., at 285. In *Scanlon* the Court held that § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794, which provides remedies for "any recipient of Federal assistance," does not contain the unmistakable language necessary to negate the States' Eleventh Amendment immunity. For the same reasons, we hold today that the general language of the Jones Act does not authorize suits against the States in federal court.[6]

IV

In *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184 (1964), the Court considered whether an employee of a state-owned railroad could sue the State in federal court under the FELA. The Court concluded that the State of Alabama had waived its Eleventh Amendment immunity. *Id.*, at 186. It reasoned that Congress evidenced an intention to abrogate Eleventh Amendment immunity by making the FELA applicable to "every common carrier by railroad while engaging in commerce between any of the several States . . . ." § 1, 35 Stat. 65, 45 U. S. C. § 51. The Court mistakenly relied on cases holding that general language in the Safety Appliance Act, §§ 2, 6, and the Railway Labor Act, § 151 *et seq.*, made those statutes applicable to the

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[6] Because Eleventh Amendment immunity "partakes of the nature of a jurisdictional bar," *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974), we have no occasion to consider the State's additional argument that Congress did not intend to afford seamen employed by the States a remedy under the Jones Act.

States.[7] It reasoned that it "should not presume to say, in the absence of express provision to the contrary, that [Congress] intended to exclude a particular group of [railroad] workers from the benefits conferred by the Act." *Parden* v. *Terminal Railway of Alabama Docks Dept.*, *supra*, at 190. But, as discussed above, the constitutional role of the States sets them apart from other employers and defendants. *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 246; *Pennhurst II*, 465 U. S., at 99; *Edelman* v. *Jordan*, 415 U. S., at 673; *Quern* v. *Jordan*, *supra*, at 342–343; *Employees* v. *Missouri Dept. of Public Health and Welfare*, *supra*. As the dissenting opinion in *Parden* states:

> "It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense." 377 U. S., at 198–199 (WHITE, J., dissenting).

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[7] As the dissenting opinion in *Parden* observed, these cases do not support the Court's holding on the Eleventh Amendment issue. 377 U. S., at 200, n. 2 (WHITE, J., dissenting, joined by Douglas, Harlan, and Stewart, JJ.). *California* v. *Taylor*, 353 U. S. 553 (1957), was a suit against the National Railroad Adjustment Board that expressly reserved the Eleventh Amendment question. *Id.*, at 568, n. 16 ("The contention of the State that the Eleventh Amendment . . . would bar an employee . . . from enforcing an award . . . in a suit against the State in a United States District Court . . . is not before us under the facts of this case"). *United States* v. *California*, 297 U. S. 175 (1936), was a suit brought by the United States, against which the States are not entitled to assert sovereign immunity. See *United States* v. *Mississippi*, 380 U. S. 128, 140–141 (1965). Finally, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 280–282 (1959), involved an interstate compact that expressly permitted the bistate corporation to sue and be sued.

Although our later decisions do not expressly overrule *Parden*, they leave no doubt that *Parden*'s discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law. In *Employees* v. *Missouri Dept. of Public Health and Welfare* the Court emphasized that "*Parden* was premised on the conclusion that [the State] . . . had consented to suit in the federal courts . . . ." 411 U. S., at 281, n. 1. The Court refused to extend the reasoning of *Parden* to "infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution." *Id.*, at 285. In subsequent cases the Court consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity. *Atascadero State Hospital* v. *Scanlon*, *supra*, at 242; *Pennhurst II*, *supra*, at 99; *Quern* v. *Jordan*, *supra*, at 342–345. Accordingly, to the extent that *Parden* v. *Terminal Railway*, *supra*, is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.[8]

V

Today, for the fourth time in little more than two years, see *Papasan* v. *Allain*, 478 U. S. 265, 293 (1986) (BRENNAN, J., concurring in part and dissenting in part); *Green* v. *Mansour*, 474 U. S. 64, 74 (1985) (BRENNAN, J., dissenting); *Atascadero State Hospital* v. *Scanlon*, *supra*, at 247 (BRENNAN, J., dissenting), four Members of the Court urge that we overrule *Hans* v. *Louisiana*, 134 U. S. 1 (1890), and the long line of cases that has followed it. The rule of law depends in large part on adherence to the doctrine of *stare decisis*. Indeed, the doctrine is "a natural evolution from the very nature of our institutions." Lile, Some Views on the Rule of *Stare Decisis*, 4 Va. L. Rev. 95, 97 (1916). It follows that "any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). Although the doctrine is not rigidly observed in constitutional cases, "[w]e should not be . . . unmindful, even when constitutional questions are involved, of the principle of *stare decisis*, by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us." *Green* v. *United States*, 355 U. S. 184, 215 (1957) (Frankfurter, J., dissenting). Despite these time-honored principles, the dissenters—on the basis of ambiguous historical evidence—would flatly overrule a number of major decisions of the Court, and cast doubt on others. See n. 27, *infra*. Once again, the dissenters have placed in issue the fundamental nature of our federal system.[9]

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[8] As discussed, *supra*, at 475 and n. 5, we have no occasion in this case to consider the validity of the additional holding in *Parden*, that Congress has the power to abrogate the States' Eleventh Amendment immunity under the Commerce Clause to the extent that the States are engaged in interstate commerce.

A

The constitutional foundation of state sovereign immunity has been well described by JUSTICE MARSHALL in his separate opinion in *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279 (1973):

> "It had been widely understood prior to ratification of the Constitution that the provision in Art. III, §2, concerning 'Controversies . . . between a State and Citizens of another State' would not provide a mechanism for making States unwilling defendants in federal court. The Court in *Chisholm*, however, considered the plain meaning of the constitutional provision to be controlling.

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[9] We address today only two principal arguments raised by the dissent: that citizens may bring federal-question actions against the States in federal court, see *infra*, at 480–488, and that citizens may bring admiralty suits against the States, see *infra*, at 488–493.

> The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding, see, *e. g.*, *Hans* v. *Louisiana* . . . . Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and 'it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.'" *Id.*, at 291–292 (MARSHALL, J., concurring in result) (citations omitted).

Although the dissent rejects the Court's reading of the historical record, there is ample support for the Court's rationale, which has provided the basis for many important decisions.

1

JUSTICE BRENNAN has argued at length that "[a] close examination of the historical records" demonstrates that "[t]here simply is no constitutional principle of state sovereign immunity." *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 259 (dissenting opinion). In his dissent today, he repeats and expands this historical argument. *Post*, at 504–516. The dissent concedes, as it must, that three of the most prominent supporters of the Constitution—Madison, Hamilton, and Marshall—took the position that unconsenting States would not be subject to suit in federal court.[10] The

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[10] Madison, Hamilton, and Marshall took this position in response to suggestions that the Clause in Article III, §2, extended the federal judicial power to controversies "between a State and Citizens of another

Court has relied on these statements in the past. See *Edelman* v. *Jordan*, 415 U. S., at 660–662, n. 9; *Monaco* v. *Mississippi*, 292 U. S. 313, 323–325 (1934); *Hans* v. *Louisiana*, 134

State." James Madison, often described as the "father of the Constitution," addressed the effect of the first Clause during the Virginia Convention:

"[The Supreme Court's] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation [the Clause] can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

. . . . .

"It appears to me that this [Clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it." 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. 1861).

The same day, John Marshall said to the Virginia Convention:

"I hope that no gentleman will think that a state will be called to the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. . . . I see a difficulty in making a state defendant, which does not prevent its being plaintiff." *Id.*, at 555–556.

Later that year, Alexander Hamilton wrote in The Federalist:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. . . . To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." The Federalist No. 81, pp. 548–549 (J. Cooke ed. 1961) (emphasis in original).

U. S., at 12–14. Although the dissenters would read these statements to apply only to cases in which no federal question is presented, see *post*, at 504–509; *Atascadero State Hospital* v. *Scanlon*, *supra*, at 268, 276–278, the statements themselves do not suggest such a limitation.[11] Moreover, the delicate problem of enforcing judgments against the States, that was raised by both Federalists and anti-Federalists, would have arisen in cases presenting a federal question as well as in other cases.

It is true, as the Court observed in *Hans*, *supra*, at 14, that opinions on this question differed during the ratification debates. Among those who disagreed with Madison, Hamilton, and Marshall were Edmund Randolph and James Wilson, both of whom supported ratification.[12] Opponents of ratification, including Patrick Henry, George Mason, and Richard Henry Lee, feared that the Constitution would make unconsenting States subject to suit in federal court. Despite the strong rhetoric in the dissent, these statements fall far short of demonstrating a consensus that ratification of the Constitution would abrogate the sovereign immunity of the States. Indeed, the representations of Madison, Hamilton, and Marshall that the Constitution did *not* abrogate the States' sovereign immunity may have been essential to ratification.[13] For example, the New York Convention appended to its ratification resolution a declaration of understanding that "the Judicial Power of the United States in cases in which a State may be a party, does not extend to criminal Prosecutions, or to authorize any Suit by any Person against a State." 2 Documentary History of the Constitution of the United States of America 194 (1894).[14] At most,

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[11] The dissent relies heavily on later statements in Chief Justice Marshall's opinions for the Court in *Cohens* v. *Virginia*, 6 Wheat. 264, 382–383, 412 (1821), and *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 857–858 (1824). Of course the possibility that Marshall changed his views on sovereign immunity after the Constitution was ratified, or espoused a broader view of sovereign immunity only to secure ratification, does not imply that the views he expressed at the Virginia Convention should be disregarded. In any event, the dissent places too much weight on *Cohens* and *Osborn*. In *Cohens*, it was the State that began criminal proceedings against the Cohenses. It had long been understood that sovereign immunity did not prevent persons convicted of crimes from appealing. See D. Currie, The Constitution and the Supreme Court, 1789–1888, p. 99 (1985). Accordingly, Chief Justice Marshall's opinion in *Cohens* distinguished a writ of error, which is but "a continuation of the same suit," from an independent suit against the State. 6 Wheat., at 409. Thus, as the Court properly noted in both *Hans* v. *Louisiana*, 134 U. S. 1, 19 (1890), and *Monaco* v. *Mississippi*, 292 U. S. 313, 327 (1934), the statements quoted in today's dissent were unnecessary to the decision in *Cohens*. In *Osborn*, the Court held that the Eleventh Amendment did not apply to a suit against a state official, a holding that is not at issue today. Thus, the statement quoted by the dissent, *post*, at 509, is dictum.

[12] Both Wilson and Randolph had served on the Committee of Detail that added the Clause in Article III, § 2, extending the judicial power to controversies between a State and citizens of another State. As a Member of the Court, Wilson sided with the majority in *Chisholm* v. *Georgia*, 2 Dall. 419

(1793). Randolph, while Attorney General of the United States, argued the case for Chisholm.

[13] A leading historian has concluded:

"The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted." 1 C. Warren, The Supreme Court in United States History 91 (1923).

[14] The New York Convention also stated its understanding that "every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same." 2 Documentary History of the Constitution of the United States of America 191 (1894). This view later was embodied in the Tenth Amendment, which reserves to the States, or to the people, powers not delegated to the United States by the Constitution. Of course, the Constitution does not expressly abrogate the sovereign immunity of the States. Thus the principle that States cannot be sued without their consent is broadly consistent with the Tenth Amendment.

then, the historical materials show that—to the extent this question was debated—the intentions of the Framers and Ratifiers were ambiguous.

2

No one doubts that the Eleventh Amendment nullified the Court's decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). *Chisholm* was an original action in assumpsit, filed by the South Carolina executor of a South Carolina estate, to recover money owed to the estate by Georgia. The Court held, over a dissent by Justice Iredell, that it had jurisdiction. The reaction to *Chisholm* was swift and hostile. The Eleventh Amendment passed both Houses of Congress by large majorities in 1794. Within two years of the *Chisholm* decision, the Eleventh Amendment was ratified by the necessary 12 States.[15]

The dissent, observing that jurisdiction in *Chisholm* itself was based solely on the fact that Chisholm was not a citizen of Georgia, argues that the Eleventh Amendment does not apply to cases presenting a federal question.[16] The text of the Amendment states that "[t]he Judicial power of the

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[15] President Adams did not notify Congress that the Amendment had been ratified by the necessary three-fourths of the States until January 1798. 1 J. Richardson, Messages and Papers of the Presidents 260 (1899).

[16] The dissent states that Justice Iredell's dissenting opinion in *Chisholm* v. *Georgia* is "generally regarded as embodying the rationale of the Eleventh Amendment." *Post*, at 513. As the dissent itself observes, *post*, at 515–516, Justice Iredell's opinion rests primarily on the absence of a *statutory* provision conferring jurisdiction on the Court in cases such as Chisholm's. To the extent that Justice Iredell discussed the constitutional question, his opinion is consistent with the more recent decisions of this Court:

> "So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, *under any circumstances*, a compulsive suit against the State for the recovery of money." 2 Dall., at 449 (emphasis added).

The dissent does not attempt to explain these remarks, except to observe that they were unnecessary to Justice Iredell's decision.

United States *shall not be construed* to extend to *any* suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (Emphasis added.) Federal-question actions unquestionably are suits "in law or equity"; thus the plain language of the Amendment refutes this argument.[17] Nor does the dissenting opinion offer any satisfactory explanation for the rejection, by an overwhelming margin, of an amendment offered by Senator Gallatin that would have allowed citizens to sue the States for causes of action arising under treaties.[18]

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[17] The dissent's principal textual argument rests on the similarity between the language of the Amendment and the language of the State-Citizen Diversity Clauses in Article III. See *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 286-287 (BRENNAN, J., dissenting). This argument cannot explain why Congress chose to apply the Amendment to "any suit in law or equity" rather than any suit where jurisdiction is predicated solely on diversity of citizenship. Instead, the dissent reads the Amendment to accomplish even less than its plain language suggests. As the Court long has recognized, the speed and vigor of the Nation's response to *Chisholm* suggests that the Eleventh Amendment should be construed broadly so as to further the federal interests that the Court misapprehended in *Chisholm*. The dissent also has some difficulty explaining the Clause in Article III, §2, that extends the federal judicial power "to Controversies to which the United States shall be a Party." Although arguments analogous to those in the dissent would suggest that this Clause abrogated the sovereign immunity of the United States, the dissent stops short of such an extreme conclusion.

[18] In an effort to explain the overwhelming rejection of Gallatin's amendment, the dissent suggests that Congress would have enumerated all the Article III heads of jurisdiction if it had intended to bar federal-question actions against the States. *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 287, n. 40. The dissent also speculates, without citing a shred of historical evidence, that the Senate may have rejected the proposed amendment to avoid giving the impression that it was barring federal-question actions *not* based on a treaty. Finally, the dissent observes that federal courts had no general original federal-question jurisdiction under the Judiciary Act of 1789. The dissent thus implies that the question was regarded as unimportant at the time. But the dissent also concedes that Senator Gallatin's proposed amendment was so unpopular that its adoption

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The Court's unanimous decision in *Hans* v. *Louisiana*, 134 U. S. 1 (1890), firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity. Hans, a citizen of Louisiana, brought an action against the State in federal court alleging that its failure to pay interest on certain bonds violated the Contract Clause. The Court considered substantially the same historical materials relied on by the dissent and unanimously held that the action was barred by the doctrine of sovereign immunity. Justice Bradley's opinion for the Court observed:

> "Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face." *Id.*, at 15.

In a short concurring opinion, Justice Harlan agreed with the other eight Members of the Court that "a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued." *Id.*, at 21.

Contrary to the suggestion in the dissent, *post*, at 519, the fundamental principle enunciated in *Hans* has been among the most stable in our constitutional jurisprudence. Moreover, the dissent is simply wrong in asserting that the doctrine lacks a clear rationale, *post*, at 519. Because of the sensitive problems "inherent in making one sovereign appear against its will in the courts of the other," *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S., at 294 (MARSHALL, J., concurring in result), the doctrine of sovereign im-

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might have resulted in a constitutional convention. *Ibid.* This concession hardly is consistent with the dissent's assertion that adoption of the Gallatin amendment would have had no practical significance.

munity plays a vital role in our federal system. The contours of state sovereign immunity are determined by the structure and requirements of the federal system. The rationale has been set out most completely in the Court's unanimous opinion, per Chief Justice Hughes, in *Monaco* v. *Mississippi*, 292 U. S. 313 (1934). First, the United States may sue a State, because that is "inherent in the Constitutional plan." *Id.*, at 329. Absent such a provision, "'the permanence of the Union might be endangered.'" *Ibid.* (quoting *Oklahoma* v. *Texas*, 258 U. S. 574, 581 (1922)). Second, States may sue other States, because a federal forum for suits between States is "essential to the peace of the Union." *Monaco* v. *Mississippi*, *supra*, at 328. Third, States may not be sued by foreign states, because "[c]ontroversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative." 292 U. S., at 331. Fourth, the Eleventh Amendment established "an absolute bar" to suits by citizens of other States or foreign states. *Id.*, at 329. Finally, "[p]rotected by the same fundamental principle [of sovereign immunity], the States, in the absence of consent, are immune from suits brought against them by their own citizens . . . ." *Ibid.* The Court has never questioned this basic framework set out in *Monaco* v. *Mississippi*.

The dissenters offer their unsupported view that the principle of sovereign immunity is "'pernicious'" because it assertedly protects States from the consequences of their illegal conduct and prevents Congress from "'tak[ing] steps it deems necessary and proper to achieve national goals within its constitutional authority.'" *Post*, at 521 (quoting *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 302 (BRENNAN, J., dissenting)). Of course, the dissent's assertion that our cases construing the Eleventh Amendment deprive Congress of some of its constitutional power is simply question-begging. Moreover, as noted *supra*, at 475, Congress clearly has authority to limit the Eleventh Amendment when it acts to enforce the Fourteenth Amendment. *Fitzpatrick* v. *Bitzer*, 427 U. S., at 456. The dissent's statement that sovereign immunity "protect[s] the States from the consequences of their illegal conduct" erroneously suggests that aggrieved individuals are left with no remedy for harmful state actions. Relief often may be obtained through suits against state officials rather than the State itself, or through injunctive or other prospective remedies. *Edelman* v. *Jordan*, 415 U. S. 651 (1974). Municipalities and other local government agencies may be sued under 42 U. S. C. § 1983. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). In addition, the States may provide relief by waiving their immunity from suit in state court on state-law claims.[19] That States are not liable in other circumstances is a necessary consequence of their role in a system of dual sovereignties. Although the dissent denies that sovereign immunity is "'required by the structure of the federal system,'" *post*, at 520 (quoting *Atascadero*, *supra*, at 302), the principle has been deeply embedded in our federal system from its inception.

B

As a fallback position, the dissent argues that the doctrine of sovereign immunity has no application to suits in admiralty against unconsenting States. *Post*, at 497–504. This argument also is directly contrary to long-settled authority, as well as the Court's recognition that the Eleventh Amendment affirms "the fundamental principle of sovereign immunity," *Pennhurst II*, 465 U. S., at 98; *Monaco* v. *Mississippi*, *supra*, at 329.

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In *Ex parte New York, No. 1*, 256 U. S. 490 (1921), a unanimous Court held that unconsenting States are immune from

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[19] In this case, for example, Welch is not without a remedy: She may file a workers' compensation claim against the State under the Texas Tort Claims Act, ch. 292, 1969 Tex. Gen. Laws 874, amended by ch. 50, 1973 Tex. Gen. Laws 77. See Brief for Respondents 34–35.

in personam suits in admiralty brought by private citizens.[20] Today the dissent asserts that the Court's opinion in *Ex parte New York, No. 1*, "did not attempt to justify its obliteration" of the traditional distinction between admiralty cases and cases in law or equity. *Post*, at 500. On the contrary, the Court expressly recognized the distinction, see 256 U. S., at 497, and provided a reasoned basis for its holding:

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." *Ibid.* (citations omitted).

The Court has adhered to this rule in subsequent cases. *In re New York, No. 2*, 256 U. S. 503 (1921), held that a private citizen may not bring an admiralty action *in rem* against a vessel owned by a State. The Court concluded that "'[t]o permit a creditor to seize and sell [a government-owned vessel] to collect his debt would be to permit him in some degree to destroy the government itself.'" *Id.*, at 511 (quoting *Klein* v. *New Orleans*, 99 U. S. 149, 150 (1879)).[21] More recently, in *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982), eight Members of the Court reaffirmed the settled rule that the Eleventh Amendment bars admiralty actions against the State or its officials seeking damages to be paid from the state treasury. *Id.*, at 698–699 (opinion of STEVENS, J.); *id.*, at 706–710 (WHITE, J., concurring in judgment in part and dissenting in part). To be sure, JUSTICE STEVENS' opinion states that "we need not decide the extent to which a federal district court exercising admiralty *in rem* jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res." *Id.*, at 697. Of course, that statement has no application to an action *in personam*, such as Welch's suit under the Jones Act.[22]

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[20] The opinion was written by Justice Pitney for a strong Court that included Justices Holmes and Brandeis. Chief Justice White, who died 13 days before the decision was announced, presumably concurred in the result and the reasoning.

[21] The dissent insists that *In re New York, No. 2*, does not support our holding. *Post*, at 500–501, n. 5. As noted *supra*, at 473, n. 3, eight Members of the Court recently have thought otherwise. In *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982), JUSTICE STEVENS'

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The dissent suggests that *In re New York, No. 1*, decided in 1921, overruled settled law to the effect that the Constitution does not bar private citizens from bringing admiralty

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opinion, joined by Chief Justice Burger and JUSTICES MARSHALL and BLACKMUN, explains that *In re New York, No. 2*, holds:

> "[A]n action—otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State. Otherwise, the Eleventh Amendment could easily be circumvented; an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*." 458 U. S., at 699.

JUSTICE WHITE's opinion in *Treasure Salvors*, joined by JUSTICES POWELL, REHNQUIST, and O'CONNOR, reads *In re New York, No. 2*, even more broadly, as holding that "sovereign immunity bars process against a res in the hands of state officers." 458 U. S., at 709.

[22] The dissent suggests that a distinction may exist between admiralty suits based on a statute and other admiralty suits against the States. The only argument the dissent advances in favor of this distinction is that "admiralty is not mentioned in the Eleventh Amendment." *Post*, at 502. But that observation—as well as the arguments that the Eleventh Amendment embodies a principle of sovereign immunity—applies to all admiralty suits. The perceived distinction is simply unsound.

suits against the States. *Post*, at 500. The dissent concedes that the Court "'did not pass on the applicability of the Eleventh Amendment in admiralty'" prior to 1921. *Post*, at 499 (citation omitted). It nevertheless asserts that dicta in *United States* v. *Peters*, 5 Cranch 115 (1809), and *Governor of Georgia* v. *Madrazo*, 1 Pet. 110 (1828), support the "holding" of *United States* v. *Bright*, 24 Fed. Cas. 1232 (No. 14,647) (CC Pa. 1809), that the Eleventh Amendment does not apply to suits in admiralty. In fact these early cases cast considerable doubt on the dissent's position.

United States v. *Peters* was a suit against the heirs of David Rittenhouse, who had served as treasurer of the State of Pennsylvania during the Revolutionary War. While Rittenhouse was treasurer, the State had seized a British vessel and sold it as a prize of war. Rittenhouse had deposited most of the proceeds in his own account, and had not turned them over to the State at the time of his death. Chief Justice Marshall's opinion for the Court turned on the facts that "the suit was not instituted against the state, or its treasurer, but against the executrixes of David Rittenhouse," and that the State "had neither possession of, nor right to, the property." 5 Cranch, at 139–141. Indeed, language in the Court's opinion suggests that an action against the State would have been barred by the Eleventh Amendment:

> "The [eleventh] amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant." *Id.*, at 139.

Thus, *Peters* does not support the dissenters' position.[23]

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[23] The trial in *United States* v. *Bright*, 24 Fed. Cas. 1232 (No. 14,647) (CC Pa. 1809), occurred *after* the Court's decision in *Peters*. *Peters* there-

The dissent's reliance on *Governor of Georgia* v. *Madrazo*, *supra*, also is misplaced. Madrazo, a Spanish subject, sued the Governor of Georgia in admiralty to obtain possession of a cargo of slaves or the proceeds from their sale. Chief Justice Marshall's opinion for the Court held that the Eleventh Amendment applies "where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character." *Id.*, at 123–124. Although Madrazo argued that the Eleventh Amendment does not apply to suits in admiralty, the Court carefully avoided the question. Instead, it held that the District Court where the action was filed had no jurisdiction regardless of whether the Eleventh Amendment applied.[24]

Madrazo then filed an original admiralty proceeding directly against Georgia in this Court. Once again the Court avoided the question whether the Eleventh Amendment ap-

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fore cannot possibly have "supported" the holding of *Bright* in the sense of approval or endorsement. Bright was an officer of the Pennsylvania state militia who defended the Rittenhouse home against federal soldiers attempting to enforce the judgment in *Peters*. Circuit Justice Washington's remarks, that the dissent characterizes as the "holding" of the case, *post*, at 498, actually were part of his charge to the jury. The Court had no opportunity to consider Justice Washington's statements, because it lacked jurisdiction to hear an appeal from Bright's conviction.

[24] The Court noted that the action was between a State and a foreign subject, an action within the Court's original jurisdiction under Article III, § 2, of the Constitution and § 13 of the Judiciary Act of 1789, 1 Stat. 73, 80. Thus, the Court concluded that, "if the 11th amendment . . . does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court," *Governor of Georgia* v. *Madrazo*, 1 Pet., at 124, because it was a suit between a State and a foreign subject. This conclusion is surprising in view of the fact that the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80, conferred original, but not exclusive, jurisdiction of such actions on the Court. Congress had conferred admiralty jurisdiction on the district courts in § 9 of the Judiciary Act, 1 Stat. 76–77. Moreover, Chief Justice Marshall's opinion for the Court in *Cohens* v. *Virginia*, 6 Wheat., at 394–402, already had indicated that the Court's original jurisdiction under Article III is not exclusive. See D. Currie, The Constitution and the Supreme Court, 1789–1888, p. 105, n. 98 (1985).

plies to suits in admiralty. Instead, the Court concluded that the case was not an admiralty action, but was "a mere personal suit against a state, to recover proceeds in its possession." *Ex parte Madrazzo*, 7 Pet. 627, 632 (1833). This rather strained conclusion was contrary to "the assumption of all concerned" that the action was maritime in nature. D. Currie, The Constitution and the Supreme Court, 1789–1888, p. 105, n. 98 (1985).

On balance, the early cases in fact indicate that unconsenting States were immune from suits in admiralty.[25] At the very least, they demonstrate that the dissent errs in suggesting that the amenability of States to suits in admiralty was "settled," *post*, at 499.[26] We therefore decline to overrule precedents that squarely reject the dissenters' position.

C

In deciding yet another Eleventh Amendment case, we do not write on a clean slate. The general principle of state sovereign immunity has been adhered to without exception by this Court for almost a century. The dissent nevertheless urges the Court to ignore *stare decisis* and overrule the long and unbroken series of precedents reaffirming this principle. If the Court were to overrule these precedents, a number of other major decisions also would have to reconsidered.[27] As we have stated, *supra*, at 478–479, the doctrine of *stare decisis* is of fundamental importance to the rule of law. For this reason, "any departure from the doctrine . . . demands special justification." *Arizona* v. *Rumsey*, 467 U. S., at 212. The arguments made in the dissent fall far short of justifying such a drastic repudiation of this Court's prior decisions.[28]

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[25] It is of course true, as the dissent observes, that Justice Story's treatise on the Constitution observed that a suit in admiralty is not, strictly speaking, a suit in law or equity. *Post*, at 499 (quoting 3 J. Story, Commentaries on the Constitution of the United States 560–561 (1833)). Justice Story, however, merely observed that "[i]t has been doubted whether [the eleventh] amendment extends to cases of admiralty and maritime jurisdiction," *id.*, at 560, and cited only the cases discussed above. Moreover, Justice Story was noted for his expansive view of the admiralty jurisdiction of federal courts. See, *e. g.*, *De Lovio* v. *Boit*, 7 Fed. Cas. 418 (No. 3,776) (CC Mass. 1815); Note, 37 Am. L. Rev. 911, 916 (1903) ("It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it").

[26] In addition, the dissent accords little weight to early cases applying the general admiralty principle that maritime property belonging to a sovereign cannot be seized. *E. g.*, *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812); *L'Invincible*, 1 Wheat. 238 (1816); *The Santissima Trinidad*, 7 Wheat. 283 (1822). See *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S., at 709–710, and n. 6 (opinion of WHITE, J.).

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[27] The dissent is written as if the slate had been clean since *Hans* was decided 97 years ago. As noted above, *Hans* has been reaffirmed in case after case, often unanimously and by exceptionally strong Courts. The two principal holdings of *Hans* that the dissent challenges are that the federal judicial power does not extend either to suits against States that arise under federal law, or to suits brought against a State by its own citizens. If these holdings were rejected, the Court would overrule at least 17 cases, in addition to *Hans* itself. Twelve of these cases relied on *both* of these principles. See *Papasan* v. *Allain*, 478 U. S. 265 (1986); *Green* v. *Mansour*, 474 U. S. 64 (1985); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985); *Edelman* v. *Jordan*, 415 U. S. 651 (1974); *Quern* v. *Jordan*, 440 U. S. 332, 342 (1979); *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279 (1973); *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459 (1945); *Missouri* v. *Fiske*, 290 U. S. 18 (1933); *Ex parte New York, No. 1*, 256 U. S. 490 (1921); *Ex parte New York, No. 2*, 256 U. S. 503 (1921); *Duhne* v. *New Jersey*, 251 U. S. 311 (1920); *Fitts* v. *McGhee*, 172 U. S. 516 (1899). Four of them rested on the principles *Hans* established for determining when Congress has extended the federal judicial power to include actions against States under federal law. *County of Oneida* v. *Oneida Indian Nation of New York*, 470 U. S. 226 (1985); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1944); *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151 (1909); *Smith* v. *Reeves*, 178 U. S. 436 (1900). Finally, one would be overruled only to the extent the Court rejected the principle that the federal judicial power does not extend to suits against States by their own citizens. *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984).

Repudiation of these principles also might justify reconsideration of a variety of other cases that were concerned with this Court's traditional treatment of sovereign immunity. *E. g., Florida Dept. of Health and Rehabilitative Services* v. *Florida Nursing Home Assn.*, 450 U. S. 147 (1981); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978); *Monaco* v. *Mississippi*, 292 U. S. 313 (1934); *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911).

VI

For the reasons we have stated, the judgment of the Court of Appeals for the Fifth Circuit is affirmed.

It is so ordered.

JUSTICE WHITE, concurring.

The Court expressly stops short of addressing the issue whether the Jones Act affords a remedy to seamen employed by the States. See *ante*, at 476, n. 6. The Court, however, has already construed the Jones Act to extend remedies to such seamen. *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 282–283 (1959). Congress has not disturbed this construction, and the Court, as I understand it, does not now purport to do so.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

Petitioner in this case did not assert as a basis for reversing the judgment that *Hans* v. *Louisiana*, 134 U. S. 1 (1890), had been wrongly decided. That argument was introduced by an *amicus*, addressed only briefly in respondents' brief, and touched upon only lightly at oral argument. I find both the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters.

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[28] Apart from rhetoric, the dissent relies on two arguments: (i) the "historical record," and (ii) the perceived "pernicious[ness]" of the principle of sovereign immunity. As we have noted, the fragments of historical evidence at the time of the adoption of the Constitution are as supportive of *Hans* v. *Louisiana* as they are of the dissent. In attaching weight to this ambiguous history, it is not immaterial that we are a century further removed from the events at issue than were the Justices who unanimously agreed in *Hans*. Not one of the 17 cases the dissent would overrule concludes that the historical evidence calls into question the principle of state sovereign immunity or justifies the ignoring of *stare decisis*. As for the view that it would be "pernicious" to protect States from liability for their "unlawful conduct," we have noted above that an aggrieved citizen such as petitioner in fact has a bundle of possible remedies. See *supra*, at 488, and n. 19.

I find it unnecessary to do so in any event. Regardless of what one may think of *Hans*, it has been assumed to be the law for nearly a century. During that time, Congress has enacted many statutes—including the Jones Act and the provisions of the Federal Employers' Liability Act (FELA) which it incorporates—on the assumption that States were immune from suits by individuals. Even if we were now to find that assumption to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed. Thus, although the terms of the Jones Act (through its incorporation of the FELA) apply to all common carriers by water, I do not read them to apply to States. For the same reason, I do not read the FELA to apply to States, and therefore agree with the Court that *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184 (1964), should be overruled. Whether or not, as *Hans* appears to have held, Article III of the Constitution contains an implicit limitation on suits brought by individuals against States by virtue of a nearly universal "understanding" that the federal judicial power could not extend to such suits, such an understanding clearly underlay the Jones Act and the FELA.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The Court overrules *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184 (1964), and thereby continues aggressively to expand its doctrine of Eleventh Amendment sovereign immunity. I adhere to my belief that the doctrine "rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 248 (1985) (BRENNAN, J., dissenting). In my view, the Eleventh Amendment does not bar the District Court's jurisdiction over the Jones Act suit by Jean Welch against the State of Texas and the Texas Highway Department for four independent reasons. First, the Amendment does not limit federal jurisdiction over suits in admiralty. Second, the Amendment bars only actions against a State by citizens of another State or of a foreign nation. Third, the Amendment applies only to diversity suits. Fourth, even assuming the Eleventh Amendment were applicable to the present case, Congress abrogated state immunity from suit under the Jones Act, which incorporates the Federal Employers' Liability Act (FELA). I therefore dissent.

I

Article III provides that the "judicial power" assigned to federal courts extends not only to "Cases in Law and Equity," but also "to all Cases of admiralty and maritime Jurisdiction."[1] In the instant case, the District Court stated that the "plaintiff brought this suit in admiralty." 533 F. Supp. 403, 404 (SD Tex. 1982). The Eleventh Amendment limits the

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[1] Article III, § 2, provides:

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

"Judicial power" in certain suits "in law or equity."[2] Therefore, even if the Eleventh Amendment does bar federal jurisdiction over cases in which a State is sued by its own citizen, its express language reveals that it does so *only* in "Cases in Law and Equity," and not in "Cases of admiralty and maritime Jurisdiction."

The leading case on the relationship between admiralty jurisdiction and the Eleventh Amendment for over a century was *United States* v. *Bright*, 24 Fed. Cas. 1232 (No. 14,647) (CC Pa. 1809), which was written by Circuit Justice Bushrod Washington. It held that the Eleventh Amendment does not bar a suit in admiralty against a State. Justice Washington acknowledged that a suit against a State raised sensitive issues, but believed himself bound by the fact that the Amendment does not refer to suits in admiralty. Furthermore, he noted that a court usually possesses the subject matter of the suit (*i. e.*, the ship) in an admiralty *in rem* proceeding, and thereby avoids the "delicate" issue of confronting a State with a decree commanding it to relinquish certain property. *Id.*, at 1236. This was not a controversial holding in its day. While the Court during Chief Justice Marshall's tenure did not have an opportunity to reach this issue, its dictum in *United States* v. *Peters*, 5 Cranch 115 (1809), and *Governor of Georgia* v. *Madrazo*, 1 Pet. 110 (1828),[3] supported the holding of *Bright*. See *Atascadero*

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[2] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[3] None of these Marshall Court cases casts any doubt on the correctness of *United States* v. *Bright*, 24 Fed. Cas. 1232 (No. 14,647) (CC Pa. 1809). The Court, however, asserts that language in *United States* v. *Peters*, 5 Cranch, at 139–141, supports its viewpoint. The language it cites, *ante*, at 491, is taken out of context. In *Peters*, the Court found that the suit was not instituted against the State, but against a state official, as an individual party. 5 Cranch, at 139. Thus, the suit was not barred be-

State Hospital v. *Scanlon*, *supra*, at 292–293 (BRENNAN, J., dissenting).

"Although the Supreme Court did not pass on the applicability of the Eleventh Amendment in admiralty until more than a century later, it was assumed by bench and bar in the meantime that *Bright* was correctly reasoned." J. Orth, The Judicial Power of the United States 37 (1987). Justice Joseph Story wrote in 1833 that:

> "[T]he language of the amendment is, that 'the judicial power of the United States shall not be construed to extend to any suit *in law or equity*.' But a suit in the admiralty is not, correctly speaking, a suit in law or in equity; but is often spoken of in contradistinction to both." 3 J. Story, Commentaries on the Constitution of the United States 560–561 (1833) (emphasis in original), citing *United States* v. *Peters*, *supra; United States* v. *Bright*, *supra; Governor of Georgia* v. *Madrazo*, *supra*.

Nineteenth-century commentators regarded *Bright* as having settled the matter. Peter du Ponceau, in his lectures to the Law Academy of Philadelphia in 1834 simply stated: "It has been held that this restriction [by the Eleventh Amendment] does not extend to cases of admiralty and maritime jurisdiction." P. du Ponceau, A Brief View of the Constitution of the United States 37–38 (1834). See Fletcher, A Historical

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cause "[t]he amendment simply provides, that no suit shall be commenced or prosecuted against a state." *Ibid.* The Court was focusing only on the identity of the defendant and not on the identity of the plaintiff. Indeed, the suit was brought by the United States Government, and States are not immune from actions brought by the United States. *Ante*, at 487. Read in context, the quotation from *Peters* cited by the Court provides no support for the Court's position.

The Court in *Peters* heavily relied on the Amendment's plain language to justify its view that the Amendment applied only to States and not to state officials. 5 Cranch, at 139. The *Bright* case resulted from an attempt to enforce the judgment rendered in *Peters*. As indicated, *supra*, at 498, the court in *Bright* also heavily relied on the plain language of the Amendment in holding that the Amendment did not affect admiralty suits.

Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033, 1080–1081 (1983).[4]

In 1921, *Bright* was disapproved of, at least in part, by *Ex parte New York, No. 1*, 256 U. S. 490 (1921). *Ex parte New York, No. 1*, involved libel actions against a state official in his official capacity in connection with vessels operated by the State of New York. The Court held that a State was immune under the Eleventh Amendment from an *in personam* suit in admiralty brought by a private individual without the State's consent.

The Court did not attempt to justify its obliteration of *Bright*'s distinction between cases in admiralty and cases in law or equity, but simply referred in passing to *Hans* v. *Louisiana*, 134 U. S. 1 (1890). 256 U. S., at 497–498.[5] Merely

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[4] The universal acceptance of *Bright*'s holding suggests that States were not accorded status equal to foreign sovereigns in the early 19th century. See, *e. g.*, *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself"). The early admiralty cases cited today by the Court, *ante*, at 493, n. 25, indicate that foreign countries were accorded sovereign immunity based on the international consequences of a federal court's intervention. See, *e. g.*, *The Santissima Trinidad*, 7 Wheat. 283, 337 (1822) (Story, J.) ("The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse").

[5] The Court also cites two other cases that do not support its holding on the Eleventh Amendment issue. In *Ex parte New York, No. 2*, 256 U. S. 503 (1921), the Court held that an *in rem* action against a State was barred by the common-law principle that "property and revenue necessary for the exercise of powers [by government] are to be considered as part of the machinery of government exempt from seizure and sale under process against the city . . . ." *Id.*, at 511.

In *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982) (opinion of STEVENS, J.), a four-Justice plurality held that the Eleventh Amendment did not bar the process issued by the District Court to secure citing to *Hans* is plainly an inadequate justification. *Hans* was a suit based on federal-question jurisdiction and, moreover, relied primarily on materials that justified the application of the Eleventh Amendment to cases in diversity jurisdiction. See *infra*, at 509–516. It did not address the effect of the Eleventh Amendment on the extension of judicial power in Article III to admiralty suits.

The distinction between admiralty cases and ordinary cases in law or equity was not a casual or technical one from the viewpoint of the Framers of the Constitution. Admiralty was a highly significant, perhaps the most important, subject-matter area for federal jurisdiction at the end of the 18th century. "Maritime commerce was then the jugular vein of the Thirteen States. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." F. Frankfurter & J. Landis, The Business of the Supreme Court 7 (1927). Alexander Hamilton noted in the Federalist No. 80: "The most bigoted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes." The Federalist No. 80, p. 538 (J. Cooke ed. 1961). Outside of *Ex parte New York, No. 1*, the Court has not ignored this legal distinction between admiralty and other cases in any other instance of constitutional and statutory interpretation. See, *e. g.*, *Romero* v. *Interna-*

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possession of artifacts held by state officials. The plurality distinguished the *Ex parte New York* cases because the "action [was] not an *in personam* action brought to recover damages from the State." 458 U. S., at 699. The Court carefully emphasized the narrowness of its holding: "In ruling that the Eleventh Amendment does not bar execution of the warrant, we need not decide the extent to which a federal district court exercising admiralty *in rem* jurisdiction over property before the court may adjudicate the rights of claimants to that property against sovereigns that did not appear and voluntarily assert any claim that they had to the res." *Id.*, at 697. Four Justices dissented in part from the judgment on the ground that the action was a suit against the State and therefore barred by the Eleventh Amendment. *Id.*, at 705, 706 (opinion of WHITE, J., joined by POWELL, REHNQUIST, and O'CONNOR, JJ.).

tional Terminal Operating Co., 358 U. S. 354, 368 (1959); *Atkins* v. *The Disintegrating Co.*, 18 Wall. 272, 302–303 (1874); *Waring* v. *Clarke*, 5 How. 441, 459–460 (1847); *American Insurance Co.* v. *Canter*, 1 Pet. 511, 545–546 (1828). Cf. *Parsons* v. *Bedford*, 3 Pet. 433, 446–447 (1830) (neither admiralty nor equity cases were suits in law within the Seventh Amendment jury provision).

Even if the Court is not prepared to overrule *Ex parte New York, No. 1*, that case can and should be distinguished here. It involved a suit based on the *common law* of admiralty and state law. In contrast, the present admiralty suit seeks to enforce a *federal statute*, the Jones Act. Although the Jones Act is deemed not to satisfy the Court's requirement that Congress use "unmistakable language" to abrogate a State's sovereign immunity, it does explicitly provide for federal jurisdiction for suits under the statute. Congress specifically indicated in the Jones Act that "any seaman"[6] may maintain an action for personal injury under the Act and that "[j]urisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 U. S. C. § 688. Whatever the merits of the "unmistakable language" requirement in cases of law and equity, it is completely out of place in admiralty cases resting on federal statute, in light of the fact that admiralty is not mentioned in the Eleventh Amendment.[7] Accordingly, in admiralty cases involving federal legislation, any bar implied by *Ex parte New York, No. 1*, against common-law suits in admiralty is inapplicable.[8]

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[6] Welch's "status as a 'seaman' under the Jones Act is assumed and is not at issue." 780 F. 2d 1268, 1269 (CA5 1986).

[7] In my view, there is no reason to depart from normal rules of statutory construction to determine Congress' intent regarding admiralty suits against States in federal court. The Court has applied normal rules of statutory construction when Congress exercises its authority under an Amendment that expressly contemplates limitations on States' authority, see *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 452–453 (1976), despite the Eleventh Amendment's *express* jurisdictional bar against certain suits in law or equity. *A fortiori*, we should apply normal statutory construction when Congress exercises its express authority to extend federal jurisdiction over

Thus, a narrow holding allowing federal jurisdiction over Welch's suit in admiralty under the Jones Act against the State of Texas is consistent with precedent and the will of Congress,[9] and prevents further erosion of a legal distinc-

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admiralty cases and the Eleventh Amendment *does not expressly* bar the exercise of that authority.

It seems odd for the Court to impose an "unmistakable language" requirement on the Jones Act, especially based on an interpretation of the Eleventh Amendment that incorporates words that are not there. Departing from normal rules of statutory construction inevitably will frustrate the will of Congress. When the Jones Act was enacted, *Bright* was the prevailing precedent. Moreover, in my view, Congress expressed its intent in unmistakable language when it extended liability to employers of "any seaman" and explicitly provided for federal jurisdiction over such actions.

[8] In addition, as Part IV discusses, *infra*, at 517–519, we should be especially hesitant to incorporate the concept of state sovereign immunity with respect to those subjects over which the Constitution expressly grants authority to the National Government. Foreign and interstate commerce, which necessarily encompasses matters of admiralty, is obviously such a subject area. As we said in *United States* v. *California*, 297 U. S. 175 (1936), in rejecting an argument that a State was not subject in its sovereign capacity to a federal statute regulating interstate commerce:

"We can perceive no reason for extending [the canon of construction that a sovereign is presumptively not intended to be bound by a statute unless named in it] as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial." *Id.*, at 186–187.

[9] In *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 282 (1959), the Court considered the substantive applicability of the Jones Act to state employees: "'When Congress wished to exclude state employees, it expressly so provided.' . . . The Jones Act . . . has no exceptions from the broad sweep of the words 'Any seaman who shall suffer personal

tion which is difficult, if not impossible, to rationalize. It is patently improper to extend the Eleventh Amendment doctrine of sovereign immunity any further.[10]

II

The Eleventh Amendment does not bar a suit under the Jones Act by a Texas citizen against the State of Texas. The part of Article III, §2, that was affected by the Amendment provides: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of *another* State" and "between a State . . . and foreign . . . Citizens or Subjects" (emphasis added). The Amendment uses language identical to that in Article III to bar the extension of the judicial power to a suit "against one of the United States by Citizens of *another* State, or by Citizens or Subjects of any Foreign State" (emphasis added). The congruence of the language suggests that the Amendment specifically limits only the jurisdiction conferred by the above-referenced part of Article III. Thus, the Amendment bars only federal actions brought against a State by citizens of another State or by aliens.

Contrary to the Court's view, *ante*, at 480–484, a proper assessment of the historical record of the Constitutional Convention and the debates surrounding the state ratification conventions confirms this interpretation. See *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 263–280 (BRENNAN, J., dissenting). The Court exclusively relies on the remarks of Madison, Hamilton, and Marshall at the Virginia Convention to support its contrary position. *Ante*, at 480–484. But these statements must be considered in context.

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injury in the course of his employment may' etc." (citations omitted). The Court today does not disturb this holding. See *ante*, at 495 (WHITE, J., concurring).

[10] Cf. *United States* v. *Johnson*, 481 U. S. 681, 692 (1987) (SCALIA, J., dissenting) (arguing against extension of the *Feres* doctrine (*Feres* v. *United States*, 340 U. S. 135 (1950)) in order to "limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred").

At the Virginia Convention, discussion focused on the question of Virginia's liability for debts that arose under state law, and which could be brought into federal court only through diversity suits by citizens of *another* State. See 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. 1861) (hereinafter Elliot's Debates) (Madison) ("[Federal] jurisdiction in controversies between a state and citizens of *another* state is much objected to, and perhaps without reason . . .") (emphasis added); The Federalist No. 81, p. 548 (J. Cooke ed. 1961) (Hamilton) ("It has been suggested that an assignment of the public securities of one State to the citizens of *another*, would enable them to prosecute that state in the federal courts for the amount of those securities . . .") (emphasis added); 3 Elliot's Debates 555 (Marshall) ("With respect to disputes between a state and the citizens of *another* state, its jurisdiction has been decried with unusual vehemence . . .") (emphasis added).

Thus, the delegates to the Virginia Convention were not objecting to suits initiated by citizens of the same State; what concerned them were suits by citizens of *other* States. The majority of the delegates who spoke at the Virginia Convention, including Mason, Henry, Pendleton, and Randolph, did *not* believe that state sovereign immunity provided protection against suits initiated by citizens of other States. See *Atascadero*, *supra*, at 264–280. Moreover, those attending the Virginia Convention evidently were not persuaded by the rhetoric of Madison, Hamilton, and Marshall cited by the Court. The Convention endorsed an amendment that would have explicitly denied the federal judiciary authority over controversies between a State and citizens of other States. 3 Elliot's Debates 660–661. The felt need for this amendment shows that the delegates did not believe that state sovereign immunity barred all suits against States.[11]

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[11] Similar proposals submitted in New York, North Carolina, and Rhode Island urged amendments depriving federal courts of jurisdiction over

There is little evidence that Madison[12] or Hamilton[13] believed that Article III failed to authorize diversity or federal-question suits brought by citizens against States. We know

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cases instituted against a State by a citizen of another State or by an alien. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity 64 (1972).

[12] Madison's view of this issue is not clear. As legal historian Clyde Jacobs concluded, "[w]hether Madison thought that federal courts should possess any jurisdiction over suits instituted against a state by citizens of another state or by foreigners must remain a matter of some conjecture; indeed there is no direct evidence that he considered the question at all. . . ." *Id.*, at 12. Professor Jacobs also noted:

> "Madison and other nationalists believed that the federal judiciary should be armed with powers not only to maintain the supremacy of national law but also to review state judicial decisions that might have interstate or foreign ramifications. Thus one of the principal reasons nationalists advanced for extending the federal judicial power—the maintenance of international peace and domestic harmony—would appear to necessitate national jurisdiction in cases where the good faith of the states vis-à-vis foreigners and citizens of other states had been engaged. If, however, this proposed federal judicial jurisdiction were qualified by the doctrine of state immunity, a broad avenue would have been left open to defeat every claim made upon them by citizens of other states and by aliens. The exception to the jurisdiction would have made the proposed jurisdiction futile or, at least, negligible." *Id.*, at 13–14.

[13] Hamilton's writings in The Federalist, No. 80, suggest that he did not believe that Article III barred all suits against States:

> "It may be esteemed the basis of the union, that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.' And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, *the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens*. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspi-

Marshall's understanding of Article III from his opinions written for the Court. The Chief Justice, in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), interpreted the effect of Article III on the Court's jurisdiction to review an appeal involving, as parties, a State and a citizen of the same State. The State of Virginia was sued for a writ of error in the United States Supreme Court. The writ challenged a criminal conviction obtained in a Virginia state court. The Court rejected the State's contention that the Constitution denied federal jurisdiction over the appeal. It concluded that Article III provides federal jurisdiction "to all [federal-question cases] without making in its terms any exception whatever, and without any regard to the condition of party." *Id.*, at 378. The Chief Justice then considered whether, in the face of Article III's clear language, a general principle of state sovereign immunity could be implied. He concluded:

> "From this general grant of jurisdiction [in federal-question cases], no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; *are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not.* We think a case arising under the constitution or laws of the United States,

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cious to the principles on which it is founded." The Federalist No. 80, pp. 537–538 (J. Cooke ed. 1961) (first emphasis in original; second emphasis added).

> is cognizable in the Courts of the Union, whoever may be the parties to that case" (emphasis added). *Id.*, at 382–383.[14]

The Court in *Cohens* also clearly revealed its understanding that the Eleventh Amendment was inapplicable to a suit brought by a citizen against his or her own State. After concluding that the petition for a writ of error was not properly understood as a suit commenced or prosecuted against a State, the Chief Justice stated an alternative holding:

> "But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' *It is not then within the amendment*, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial

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[14] In *Cohens*, Chief Justice Marshall explained in detail the effect of the general principle of sovereign immunity on the scope of Article III:

"The Counsel for the [State] . . . have laid down the general proposition, that a sovereign independent state is not suable except by its own consent.

"This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides." *Cohens* v. *Virginia*, 6 Wheat., at 380.

The Court then found that in agreeing to the Constitution, the States had surrendered a significant measure of their sovereignty. It stated that the Supremacy Clause is evidence of this surrender. *Id.*, at 380–381. The Court therefore found that Article III extended jurisdiction to all federal-question suits and that "no exception is made of those cases in which a state may be party." *Id.*, at 382–383.

> power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." *Id.*, at 412 (emphasis added).

Chief Justice Marshall reaffirmed this view of the Eleventh Amendment when he wrote for the Court in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 857–858 (1824):

> "The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens."

The Court, however, chooses to ignore the clear meaning of the Constitution text based on speculation that the intentions of a few of the Framers and Ratifiers might have been otherwise. The evidence available reveals that the views of Madison and Hamilton on the issue are at best ambiguous, see nn. 12 and 13, *supra*, and that Marshall's understanding runs directly counter to the Court's position. Thus, the Eleventh Amendment only bars a federal suit initiated by citizens of another State. Moreover, as Part III demonstrates, the Amendment only bars a particular type of federal suit—an action based on diversity jurisdiction.

III

In my view, the Eleventh Amendment applies only to diversity suits and not to federal-question or admiralty suits. The parallel between the language in Article III's grant of diversity jurisdiction ("to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects") and the language in the Eleventh Amendment ("any suit in law or equity . . . by Citizens of another State or by Citizens or Subjects of any Foreign State") supports this view. The Amendment prohibits federal jurisdiction over *all* such suits in law or equity which are based on diversity jurisdiction. Since Congress had not granted federal-question jurisdiction to federal courts prior to the Amendment's ratification, the Amendment was not intended to restrict that type of jurisdiction. Furthermore, the controversy among the Ratifiers cited by the Court today, *ante*, at 480–484, involved only *diversity* suits. Moreover, the Court recognizes that the immediate impetus for adoption of the Eleventh Amendment was *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). *Ante*, at 484. *Chisholm* was a *diversity* case brought in federal court upon a state cause of action against the State of Georgia by a citizen of South Carolina. The Court relies on *Hans* v. *Louisiana*, 134 U. S. 1 (1890), to hold that the Eleventh Amendment bars Welch's suit in admiralty.

Hans, however, was a *federal-question* suit brought by a Louisiana citizen against his own State. Ignoring this fact, the Court in *Hans* relied on materials that primarily addressed the question of state sovereign immunity in diversity cases, and not on federal-question or admiralty cases.[15] It is plain from the face of the *Hans* opinion that the Court misunderstood those materials.[16] In particular, the Court in

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[15] See generally Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 11–23.

[16] A legal historian, Professor John Orth, recently described the historical approach taken by the Court in *Hans:*

"In *Hans* v. *Louisiana*, . . . Justice Bradley rewrote the history of the Eleventh Amendment. . . . Only half a dozen years before, in [*New Hampshire* v. *Louisiana*, 108 U. S. 76 (1883),] written by Chief Justice Waite and joined by Justice Bradley, the Court had accepted *Chisholm* as a correct interpretation of the Constitution as it then stood. . . .

"How did Justice Bradley suddenly attain such unhedged certitude about the original understanding and the Eleventh Amendment? No surprising discoveries about the historical record had been made in the decade of the 1880s. The Justice himself merely rehashed the familiar quotations from Madison, Marshall, and Hamilton. With regard to *Chisholm* Bradley declaimed: 'In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice

Hans heavily relied on two sources: a statement by Hamilton in The Federalist No. 81 and the views of Justice Iredell, who wrote the dissent in *Chisholm*. 134 U. S., at 12, 13–14, 18–19. A close examination of both these sources indicates that they cannot serve as support for the holding of *Hans* or of the Court today.

A

The Court today relies on the same quotation of Hamilton in The Federalist No. 81 cited by the Court in *Hans*. Compare 134 U. S., at 12–13, with *ante*, at 480–481, n. 10. The Court in *Hans* used this quotation as proof that all suits brought by individuals against States were barred, absent their consent. 134 U. S., at 14–15. But, in that passage, Hamilton was discussing cases of diversity jurisdiction, not of federal-question jurisdiction:

> "It has been suggested that an assignment of the *public securities of one state to the citizens of another*, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation." The Federalist No. 81, p. 548 (J. Cooke ed. 1961) (emphasis added).

In the ensuing discussion, Hamilton described the circumstances in which States can claim sovereign immunity. He began with the general principle of sovereign immunity.

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.

Iredell's views . . . .' Yet Iredell's dissent was manhandled. . . . Attributing sovereign immunity to the states, Bradley began the confusion that still prevails between federal and state sovereignty.

"Nothing had arisen since the decision of the New Hampshire case to change Bradley's view of the past—except the pressing need for a new rationale to justify a new result. If sovereign immunity had not existed, the Justice would have had to invent it. As it was, all that was required was to rewrite a little history." J. Orth, The Judicial Power of the United States 74–75 (1987) (Orth).

> This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union." *Id.*, at 548–549.

Hamilton believed that the States surrendered at least part of their sovereign immunity when they agreed to the Constitution. The States, however, retained their sovereign authority over state-created causes of action. "Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states and the danger intimated must be merely ideal." *Id.*, at 549. Thus, the States retained their sovereign authority over diversity suits involving the state assignment of public securities to citizens of other States.

> "A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *Ibid.*

Hamilton therefore believed that States could not be sued in federal court by citizens to collect debts in diversity actions. A careful reading of this passage demonstrates that it does not support the general principle of sovereign immunity against all suits brought by individuals against States, contrary to the Court's views in *Hans* and in the present case.

B

The Court in *Hans* also heavily relied on the rationale stated by Justice Iredell in *Chisholm*. The Court in *Chisholm* held that the case was within the jurisdiction of the Federal District Court. The Eleventh Amendment was thereafter enacted with "vehement speed," displacing the *Chisholm* ruling. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 708 (1949). The dissent of Justice Iredell is generally regarded as embodying the rationale of the Eleventh Amendment by those who broadly construe it. See *Hans* v. *Louisiana*, *supra*, at 12, 14, 18–19; see also Fletcher, 35 Stan. L. Rev., at 1077; Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 Pa. L. Rev. 515, 541 (1978). Nevertheless, I think it plain that Justice Iredell's conception of state sovereign immunity *supports* the notion that States should not be immune from suit in federal court in federal-question or admiralty cases.

Justice Iredell's dissent focused on whether the States delegated part of their sovereignty to the Federal Government upon entering into the Union and agreeing to the Constitution.

> "Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered. Each State in the Union is sovereign as to all the powers reserved." 2 Dall., at 435.

Justice Iredell defined the powers surrendered by the States in terms of the authority that resides in the Congress and the Executive Branch.

> "The powers of the general Government, either of a Legislative or executive nature, or which particularly concern Treaties with Foreign Powers, do for the most part (if not wholly) affect individuals, and not States. They require no aid from any State authority. This is the great leading distinction between the old articles of confederation, and the present constitution." *Ibid.*

He then defined the "judicial power" of Article III. Justice Iredell found that the federal judicial power "is of a peculiar kind" because of its hybrid nature. *Ibid.* His conception of state sovereign immunity centered on the dual sources of federal judicial authority. First, he delineated the portion of federal jurisdiction that "is indeed commensurate with the ordinary Legislature and Executive powers of the general government, and the Power which concerns treaties." *Ibid.* This category encompasses matters wholly within the federal sovereignty. Justice Iredell plainly was describing the federal-question and admiralty jurisdiction where federal courts have jurisdiction based on the federal subject matter of the cases.[17]

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[17] Justice Story later drew the same distinction between federal subject-matter jurisdiction and federal diversity jurisdiction as did Justice Iredell: "The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arriving under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial powers to be vested in courts ordained and established by the United States. . . . The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls . . . and as to cases of admiralty and maritime jurisdiction . . . . All these cases, then, enter into the na-

Justice Iredell then stated: "But [the judicial power] also goes further." *Ibid.* It was in the further extension of judicial power that the sovereign immunity of the States was implicated. In diversity cases, the federal judiciary was not dealing with subject matter within the realm of federal sovereignty, but was instead providing a neutral forum for the resolution of state-law issues over which the States had not given up their sovereignty.

> "Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy, yet the general Government has a Judicial Authority in regard to such subjects of controversy, and the Legislature of the United States may pass all laws necessary to give such Judicial Authority its proper effect. So far as States under the Constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires." *Id.*, at 435–436.

Justice Iredell was concerned with "the limit of our authority" in the diversity case before the Court, since "we can exercise no authority in the present instance consistently with the clear intention of the [Judiciary Act], but such as a proper State Court would have been at least competent to exercise at the time the act was passed." *Id.*, at 436–437.

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tional policy, affect the national rights, and may compromise the national sovereignty. . . .

"A different policy might well be adopted in reference to the second class of cases . . . ." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 334–335 (1816). See generally Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B. U. L. Rev. 205 (1985).

> "If therefore, no new remedy be provided (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent [state] laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable . . . ." *Id.*, at 437.

Thus, Justice Iredell's dissenting opinion rested on a conception of state sovereignty that justified the incorporation of the sovereign-immunity doctrine through the state common law, but *only* in *diversity* suits. His opinion traditionally has been cited as key to the underlying meaning of the Eleventh Amendment. See *Hans* v. *Louisiana*, 134 U. S., at 12. Yet it provides no more support for the result in *Hans* than does the plain language of the Eleventh Amendment.[18]

I will not repeat the exhaustive evidence presented in my dissent in *Atascadero* that further buttresses my view of the Eleventh Amendment sovereign immunity. See *Atascadero*, 473 U. S., at 247–304. I adhere to the view that a suit brought under a federal law against a State is not barred.

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[18] Justice Iredell avoided committing himself on the broader constitutional question concerning whether suits, other than those in diversity, were barred by the Eleventh Amendment. He noted: "So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money." *Chisholm* v. *Georgia*, 2 Dall. 419, 449 (1793). Nonetheless, he conceded, "[t]his opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial." *Id.*, at 450.

IV

The Court today overrules, in part, *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184 (1964). It rejects the holding in *Parden* that Congress evidenced an intention to abrogate Eleventh Amendment immunity by making FELA applicable to "every common carrier by railroad while engaging in commerce between any of the several States. . . ." § 1, 35 Stat. 65, 45 U. S. C. § 51. The Court instead concludes that Congress did not abrogate the sovereign immunity of States, because it did not express this intent in unmistakably clear language.

The Court's departure from normal rules of statutory construction frustrates the will of Congress. The Court's holding in *Parden* that Congress intended to abrogate the sovereign immunity of States in FELA has not been disturbed by Congress for the past two decades. In FELA, Congress not only indicated that "every common carrier . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," but also expressed in unequivocal language that the "action may be brought in a district court of the United States." 45 U. S. C. §§ 51, 56. The Court in *Parden* noted that the legislative history of FELA revealed that Congress meant to extend the scope to apply to "all commerce," without exception for state-owned carriers. 377 U. S., at 187, n. 5.

In *Parden*, the Court also comprehensively reviewed other federal statutes regulating railroads in interstate commerce, which used similar terminology. It found that we had consistently interpreted those statutes to apply to state-owned railroads. *Id.*, at 188–189, quoting *United States* v. *California*, 297 U. S. 175, 185 (1936) ("'No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute'"); *California* v. *Taylor*, 353 U. S. 553, 564 (1957) ("The fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it"). This conclusion confirmed the Court's determination in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959): "In [*Taylor*] we reviewed at length federal legislation governing employer-employee relationships and said, 'When Congress wished to exclude state employees, it expressly so provided.'" *Id.*, at 282 (citation omitted).

The Court today repeatedly relies on a bare assertion that "the constitutional role of the States sets them apart from other employers and defendants." *Ante*, at 477. This may be true in many contexts, but it is not applicable in the sphere of interstate commerce. Congress has plenary authority in regulating this area. In *Gibbons* v. *Ogden*, 9 Wheat. 1, 196–197 (1824), the Court stated:

> "If, as has always been understood, the sovereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

Thus, the Court in *Parden* concluded that the decision to regulate employers of interstate workers, be they private individuals or States, was for Congress to make:

> "While a State's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty,' . . . the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.
>
> "If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the

> right of action created by the FELA, we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act." 377 U. S., at 189–190.

Until today, *Parden* has been repeatedly cited by the Court as an established approach "to the test of waiver of the Eleventh Amendment." *County of Oneida* v. *Oneida Indian Nation of New York*, 470 U. S. 226, 252, n. 26 (1985) (POWELL, J.); see, *e. g., Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 452 (1976). I believe that *Parden* was correctly decided. "[B]y engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce." *New York* v. *United States*, 326 U. S. 572, 582 (1946). In my view, Congress abrogated state immunity to suits under FELA, a statute incorporated by the Jones Act.

V

Sound precedent should produce progeny whose subsequent application of principle in light of experience confirms the original wisdom. Tested by this standard, *Hans* has proved to be unsound. The doctrine has been unstable, because it lacks a textual anchor, an established historical foundation, or a clear rationale.[19] We should not forget that the irrationality of the doctrine has its costs. It has led to the development of a complex set of rules to avoid unfair results.[20] See, *e. g.*, *Ex parte Young*, 209 U. S. 123 (1908) (Amendment does not bar suit if plaintiff names state official, rather than State itself, as defendant); *Edelman* v. *Jordan*, 415 U. S. 651 (1974) (Amendment does not bar prospective, but only retrospective, relief). The doctrine, based on a notion of kingship, intrudes impermissibly on Congress' lawmaking power. I adhere to my belief that:

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[19] Today only four Members of the Court advocate adherence to *Hans*. Three factors counsel against continued reliance upon *Hans*. First, *Hans* misinterpreted the intent of the Framers and those who ratified the Eleventh Amendment. Cf. *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 297–298 (1976) (overruling *Low* v. *Austin*, 13 Wall. 29 (1872), because it ignored the language and objectives of the Import-Export Clause and misread earlier Court precedent). Second, the progeny of *Hans* has produced erratic and irrational results. If a general principle of state sovereign immunity is based on the sensitive problems inherent in making one sovereign appear against its will in the courts of other sovereigns, *ante*, at 486–487, then it is inexplicable why States can be sued in some cases (by other States, by the Federal Government, or when prospective relief is sought) and not in other instances (by foreign countries, by citizens of the same State, or when

> "[T]he doctrine that has thus been created is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, . . . the Court has aggressively expanded its scope. If this doctrine were required to enhance the liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the

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retrospective relief is sought). The Court's recital of the rules of sovereign immunity in *Monaco* v. *Mississippi*, 292 U. S. 313 (1934), indicates the crazy-quilt pattern of the *Hans* doctrine. *Ante*, at 487. Third, the Eleventh Amendment doctrine creates inconsistencies in constitutional interpretation. For example, under the Seventh Amendment, the Court has stated that a right to a jury trial does not extend to admiralty cases because these suits in admiralty are distinguishable from suits in law. See *Parsons* v. *Bedford*, 3 Pet. 433, 446–447 (1830). Yet today the Court ignores the distinction between suits in admiralty and in law in arriving at its decision.

[20] As Professor Orth concludes:

"By the late twentieth century the law of the Eleventh Amendment exhibited a baffling complexity. . . . 'The case law of the eleventh amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions.' Marked by its history as were few other branches of constitutional law, interpretation of the Amendment has become an arcane specialty of lawyers and federal judges." Orth 11 (citation omitted).

> decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority." *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 302 (dissenting opinion) (citations omitted).

By clinging to *Hans*, the Court today erases yet another traditional legal distinction and overrules yet another principle that defined the limits of that decision. In my view, we should at minimum confine *Hans* to its current domain. More fundamentally, however, it is time to begin a fresh examination of Eleventh Amendment jurisprudence without the weight of that mistaken precedent. I therefore dissent.

SAN FRANCISCO ARTS & ATHLETICS, INC., ET AL. *v.* UNITED STATES OLYMPIC COMMITTEE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86–270. Argued March 24, 1987—Decided June 25, 1987

Section 110 of the Amateur Sports Act of 1978 (Act) grants respondent United States Olympic Committee (USOC) the right to prohibit certain commercial and promotional uses of the word "Olympic" and various Olympic symbols. Petitioner San Francisco Arts & Athletics, Inc. (SFAA), a nonprofit California corporation, promoted the "Gay Olympic Games" to be held in 1982 by using those words on its letterheads and mailings, in local newspapers, and on various merchandise sold to cover the costs of the planned Games. The USOC informed the SFAA of the existence of the Act and requested that it terminate use of the word "Olympic" in its description of the planned Games. When the SFAA failed to do so, the USOC brought suit in Federal District Court for injunctive relief. The court granted the USOC summary judgment and a permanent injunction. The Court of Appeals affirmed, holding that the Act granted the USOC exclusive use of the word "Olympic" without requiring the USOC to prove that the unauthorized use was confusing and without regard to the defenses available to an entity sued for a trademark violation under the Lanham Act. The court also found that the USOC's property right in the word and its associated symbols and slogans can be protected without violating the First Amendment. The court did not reach the SFAA's claim that the USOC's enforcement of its rights was discriminatory in violation of the equal protection component of the Due Process Clause of the Fifth Amendment, because it held that the USOC is not a governmental actor to which the Constitution applies.

Held:

1. There is no merit to the SFAA's contention that § 110 grants the USOC nothing more than a trademark in the word "Olympic" and precludes its use by others only when it tends to cause confusion. Nor is there any merit to the argument that § 110's reference to Lanham Act *remedies* should be read as incorporating traditional *defenses* as well. Section 110's language and legislative history indicate that Congress intended to grant the USOC exclusive use of the word "Olympic" without regard to whether use of the word tends to cause confusion, and that § 110 does not incorporate defenses available under the Lanham Act. Pp. 528–530.

2. Also without merit is the SFAA's argument that the word "Olympic" is a generic word that constitutionally cannot gain trademark protection under the Lanham Act, and that the First Amendment prohibits Congress from granting a trademark in the word. When a word acquires value as the result of organization and the expenditure of labor, skill, and money by an entity, that entity constitutionally may obtain a limited property right in the word. Congress reasonably could conclude that the commercial and promotional value of the word "Olympic" was the product of the USOC's talents and energy, the end result of much time, effort, and expense. In view of the history of the origins and associations of the word "Olympic," Congress' decision to grant the USOC a limited property right in the word falls within the scope of trademark law protections, and thus within constitutional bounds. Pp. 532–535.

3. The First Amendment does not prohibit Congress from granting exclusive use of a word without requiring that the authorized user prove that an unauthorized use is likely to cause confusion. The SFAA claims that its use of the word "Olympic" was intended to convey a political statement about the status of homosexuals in society, and that § 110 may not suppress such speech. However, by prohibiting the use of one word for particular purposes, neither Congress nor the USOC has prohibited the SFAA from conveying its message. Section 110's restrictions on expressive speech are properly characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities. Congress has a broad public interest in promoting, through the USOC's activities, the participation of amateur athletes from the United States in the Olympic Games. Even though § 110's protection may exceed traditional rights of a trademark owner in certain circumstances, the Act's application to commercial speech is not broader than necessary to protect the legitimate congressional interests and therefore does not violate the First Amendment. Congress reasonably could find that the use of the word by other entities to promote an athletic event would directly impinge on the USOC's legitimate right of exclusive use. The mere fact that the SFAA claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to appropriate the value which the USOC's efforts have given to the word. Pp. 535–541.

4. The SFAA's claim that the USOC has enforced its § 110 rights in a discriminatory manner in violation of the Fifth Amendment fails, because the USOC is not a governmental actor to whom the Fifth Amendment applies. The fact that Congress granted it a corporate charter does not render the USOC a Government agent. Moreover, Congress' intent to help the USOC obtain funding does not change the analysis. Nor does the USOC perform functions that are traditionally the exclu-

sive prerogative of the Federal Government. The USOC's choice of how to enforce its exclusive right to use the word "Olympic" simply is not a governmental decision. Pp. 542–547.

781 F. 2d 733 and 789 F. 2d 1319, affirmed.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and SCALIA, JJ., joined, and in Parts I, II, and III of which BLACKMUN and O'CONNOR, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, *post*, p. 548. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 548.

Mary C. Dunlap argued the cause for petitioners. With her on the briefs were *Paul Hoffman*, *Susan McGreivy*, and *Fred Okrand*.

John G. Kester argued the cause for respondents. With him on the brief were *Edward Bennett Williams*, *Vincent J. Fuller*, *Richard G. Kline*, *Edward T. Colbert*, and *Joseph D. Lewis*.*

JUSTICE POWELL delivered the opinion of the Court.

In this case, we consider the scope and constitutionality of a provision of the Amateur Sports Act of 1978, 36 U. S. C. §§ 371–396, that authorizes the United States Olympic Committee to prohibit certain commercial and promotional uses of the word "Olympic."

Robert H. Rotstein, Antonia Hernandez, E. Richard Larson, Abby R. Rubenfeld, Leonard Graff, and *Armando M. Menocal* filed a brief for the Mexican American Legal Defense and Educational Fund et al. as *amici curiae* urging reversal.

George Kaufmann and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

Michael Ratner, Rhonda Copelon, Randall Glenn Wick, and *Richard A. Perkins* filed a brief for the Amateur Athletic Union of the United States et al. as *amici curiae*.

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I

Petitioner San Francisco Arts & Athletics, Inc. (SFAA), is a nonprofit California corporation.[1] The SFAA originally sought to incorporate under the name "Golden Gate Olympic Association," but was told by the California Department of Corporations that the word "Olympic" could not appear in a corporate title. App. 95. After its incorporation in 1981, the SFAA nevertheless began to promote the "Gay Olympic Games," using those words on its letterheads and mailings and in local newspapers. *Ibid.* The games were to be a 9-day event to begin in August 1982, in San Francisco, California. The SFAA expected athletes from hundreds of cities in this country and from cities all over the world. *Id.*, at 402. The Games were to open with a ceremony "which will rival the traditional Olympic Games." *Id.*, at 354. See *id.*, at 402, 406, 425. A relay of over 2,000 runners would carry a torch from New York City across the country to Kezar Stadium in San Francisco. *Id.*, at 98, 355, 357, 432. The final runner would enter the stadium with the "Gay Olympic Torch" and light the "Gay Olympic Flame." *Id.*, at 357. The ceremony would continue with the athletes marching in uniform into the stadium behind their respective city flags. *Id.*, at 354, 357, 402, 404, 414. Competition was to occur in 18 different contests, with the winners receiving gold, silver, and bronze medals. *Id.*, at 354–355, 359, 407, 410. To cover the cost of the planned Games, the SFAA sold T-shirts, buttons, bumper stickers, and other merchandise bearing the title "Gay Olympic Games." *Id.*, at 67, 94, 107, 113–114, 167, 360, 362, 427–428.[2]

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[1] The SFAA's president, Dr. Thomas F. Waddell, is also a petitioner.

[2] The 1982 athletic event ultimately was held under the name "Gay Games I." App. 473. A total of 1,300 men and women from 12 countries, 27 States, and 179 cities participated. *Id.*, at 475. The "Gay Games II" were held in 1986 with approximately 3,400 athletes participating from 17 countries. Brief for Respondents 8. The 1990 "Gay Games" are scheduled to occur in Vancouver, B. C. *Ibid.*

Section 110 of the Amateur Sports Act (Act), 92 Stat. 3048, 36 U. S. C. § 380, grants respondent United States Olympic Committee (USOC)[3] the right to prohibit certain commercial and promotional uses of the word "Olympic" and various Olympic symbols.[4] In late December 1981, the executive

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[3] The International Olympic Committee is also a respondent.

[4] Section 110 of the Act, as set forth in 36 U. S. C. § 380, provides:

"Without the consent of the [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

"(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

"(2) the emblem of the [USOC], consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

"(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the [USOC]; or

"(4) the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity;

"shall be subject to suit in a civil action by the [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946 [Lanham Act]) [15 U. S. C. § 1051 *et seq.*]. However, any person who actually used the emblem in subsection (a)(2) of this section, or the words, or any combination thereof, in subsection (a)(4) of this section for any lawful purpose prior to September 21, 1950, shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used, or whose assignor actually used, any other trademark, trade name, sign, symbol, or insignia described in subsections (a)(3) and (4) of this section for any lawful purpose prior to September 21, 1950 shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.

"(b) The [USOC] may authorize contributors and suppliers of goods or services to use the trade name of the [USOC] as well as any trademark, symbol, insignia, or emblem of the International Olympic Committee or of the [USOC] in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or director of the USOC wrote to the SFAA, informing it of the existence of the Amateur Sports Act, and requesting that the SFAA immediately terminate use of the word "Olympic" in its description of the planned Games. The SFAA at first agreed to substitute the word "Athletic" for the word "Olympic," but, one month later, resumed use of the term. The USOC became aware that the SFAA was still advertising its Games as "Olympic" through a newspaper article in May 1982. In August, the USOC brought suit in the Federal District Court for the Northern District of California to enjoin the SFAA's use of the word "Olympic." The District Court granted a temporary restraining order and then a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed. After further proceedings, the District Court granted the USOC summary judgment and a permanent injunction.

The Court of Appeals affirmed the judgment of the District Court. 781 F. 2d 733 (1986). It found that the Act granted the USOC exclusive use of the word "Olympic" without requiring the USOC to prove that the unauthorized use was confusing and without regard to the defenses available to an entity sued for a trademark violation under the Lanham Act, 60 Stat. 427, as amended, 15 U. S. C. § 1051 *et seq.* It did not reach the SFAA's contention that the USOC enforced its rights in a discriminatory manner, because the court found that the USOC is not a state actor bound by the constraints of the Constitution. The court also found that the USOC's "property righ[t] [in the word 'Olympic' and its asso-

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used by the [USOC] or United States Olympic or Pan-American team or team members.

"(c) The [USOC] shall have exclusive right to use the name 'United States Olympic Committee'; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (a)(2) of this section; and the words 'Olympic', 'Olympiad', 'Citius Altius Fortius' or any combination thereof subject to the preexisting rights described in subsection (a) of this section."

ciated symbols and slogans] can be protected without violating the First Amendment." 781 F. 2d, at 737. The court denied the SFAA's petition for rehearing en banc. Three judges dissented, finding that the panel's interpretation of the Act raised serious First Amendment issues. 789 F. 2d 1319, 1326 (1986).

We granted certiorari, 479 U. S. 913 (1986), to review the issues of statutory and constitutional interpretation decided by the Court of Appeals. We now affirm.

II

The SFAA contends that the Court of Appeals erred in interpreting the Act as granting the USOC anything more than a normal trademark in the word "Olympic." "[T]he 'starting point in every case involving construction of a statute is the language itself.'" *Kelly* v. *Robinson*, 479 U. S. 36, 43 (1986) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring)). Section 110 of the Act provides:

> "Without the consent of the [USOC], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—
>
> . . . . .
>
> "(4) the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity;
>
> "shall be subject to suit in a civil action by the [USOC] for the remedies provided in the [Lanham] Act." 36 U. S. C. § 380(a).

The SFAA argues that the clause "tending to cause confusion" is properly read to apply to the word "Olympic." But because there is no comma after "thereof," the more natural reading of the section is that "tending to cause confusion" modifies only "any combination or simulation thereof." Nevertheless, we do not regard this language as conclusive. We therefore examine the legislative history of this section.

Before Congress passed § 110 of the Act, unauthorized use of the word "Olympic" was punishable criminally. The relevant statute, in force since 1950, did not require the use to be confusing. Instead, it made it a crime for:

> "*any person* . . . other than [the USOC] . . . for the purpose of trade, theatrical exhibition, athletic performance, and competition or as an advertisement to induce the sale of any article whatsoever or attendance at any theatrical exhibition, athletic performance, and competition or for any business or charitable purpose *to use . . . the words 'Olympic', 'Olympiad', or 'Citius Altius Fortius' or any combination of these words.*" 64 Stat. 901, as amended, 36 U. S. C. § 379 (1976 ed.) (emphasis added).

The House Judiciary Committee drafted the language of § 110 that was ultimately adopted. The Committee explained that the previous "criminal penalty has been found to be unworkable as it requires the proof of a criminal intent." H. R. Rep. No. 95–1627, p. 15 (1978) (House Report). The changes from the criminal statute "were made in response to a letter from the Patent and Trademark Office of the Department of Commerce," *ibid.*, that the Committee appended to the end of its Report. This letter explained:

> "Section 110(a)(4) makes actionable not only use of the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', and any combination thereof, but also any simulation or confusingly similar derivation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely

> suggest a connection with the [USOC] or any Olympic activity. . . .
>
> "Section 110 *carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohibitions, e. g. words described in section (a)(4) tending to cause confusion*, to cause mistake, or to deceive with respect to the [USOC] or any Olympic activity." *Id.*, at 38 (emphasis added).

This legislative history demonstrates that Congress intended to provide the USOC with exclusive control of the use of the word "Olympic" without regard to whether an unauthorized use of the word tends to cause confusion.

The SFAA further argues that the reference in § 110 to Lanham Act *remedies* should be read as incorporating the traditional trademark *defenses* as well. See 15 U. S. C. § 1115(b).[5] This argument ignores the clear language of the section. Also, this shorthand reference to remedies replaced an earlier draft's specific list of remedies typically available for trademark infringement, *e. g.*, injunctive relief, recovery of profits, damages, costs, and attorney's fees. See Lanham Act §§ 34, 35, 15 U. S. C. §§ 1116, 1117. This list contained no reference to trademark defenses. 124 Cong. Rec. 12865, 12866 (1978) (proposed § 110(c)). Moreover, the USOC already held a trademark in the word "Olympic." App. 378–382. Under the SFAA's interpretation, the Act would be largely superfluous. In sum, the language and legislative history of § 110 indicate clearly that Congress intended to grant the USOC exclusive use of the word "Olympic" without regard to whether use of the word tends to cause confusion, and that § 110 does not incorporate defenses available under the Lanham Act.

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[5] Specifically, the SFAA argues that the USOC should not be able to prohibit its use of the word "Olympic" because its use "is descriptive of and used fairly and in good faith only to describe to users the goods or services." 15 U. S. C. § 1115(b)(4).

III

This Court has recognized that "[n]ational protection of trademarks is desirable . . . because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S. 189, 198 (1985). In the Lanham Act, 15 U. S. C. § 1051 *et seq.*, Congress established a system for protecting such trademarks. Section 45 of the Lanham Act defines a trademark as "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured or sold by others." 15 U. S. C. § 1127 (1982 ed., Supp. III). Under § 32 of the Lanham Act, the owner of a trademark is protected from unauthorized uses that are "likely to cause confusion, or to cause mistake, or to deceive." § 1114(1)(a). Section 33 of the Lanham Act grants several statutory defenses to an alleged trademark infringer. § 1115.

The protection granted to the USOC's use of the Olympic words and symbols differs from the normal trademark protection in two respects: the USOC need not prove that a contested use is likely to cause confusion, and an unauthorized user of the word does not have available the normal statutory defenses.[6] The SFAA argues, in effect, that the differences between the Lanham Act and § 110 are of constitutional dimension. First, the SFAA contends that the word "Olympic" is a generic[7] word that could not gain trademark protection under the Lanham Act. The SFAA argues that this prohibition is constitutionally required and thus that the First Amendment prohibits Congress from granting a trademark in the word "Olympic." Second, the SFAA argues that the First Amendment prohibits Congress from granting exclusive use of a word absent a requirement that the authorized user prove that an unauthorized use is likely to cause confusion. We address these contentions in turn.

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[6] The user may, however, raise traditional equitable defenses, such as laches. See Brief for Respondents 20, n. 17.

[7] A common descriptive name of a product or service is generic. Because a generic name by definition does not *distinguish* the identity of a particular product, it cannot be registered as a trademark under the Lanham Act. See §§ 2, 14(c), 15 U. S. C. §§ 1052, 1064(c). See also 1 J. McCarthy, Trademarks and Unfair Competition § 12:1, p. 520 (1984).

A

This Court has recognized that words are not always fungible, and that the suppression of particular words "run[s] a substantial risk of suppressing ideas in the process." *Cohen* v. *California*, 403 U. S. 15, 26 (1971). The SFAA argues that this principle prohibits Congress from granting the USOC exclusive control of uses of the word "Olympic," a word that the SFAA views as generic.[8] Yet this recognition always has been balanced against the principle that when a word acquires value "as the result of organization and the expenditure of labor, skill, and money" by an entity, that entity constitutionally may obtain a limited property right in the word. *International News Service* v. *Associated Press*, 248 U. S. 215, 239 (1918). See *Trade-Mark Cases*, 100 U. S. 82, 92 (1879).

There is no need in this case to decide whether Congress ever could grant a private entity exclusive use of a generic word. Congress reasonably could conclude that the commercial and promotional value of the word "Olympic" was the product of the USOC's "own talents and energy, the end result of much time, effort, and expense." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 575 (1977). The USOC, together with respondent International Olympic Committee (IOC), have used the word "Olympic" at least since 1896, when the modern Olympic Games began. App. 348. Baron Pierre de Coubertin of France, acting pursuant to a government commission, then proposed the revival of the ancient Olympic Games to promote international understanding. D. Chester, The Olympic Games Handbook 13 (1975). De Coubertin sought to identify the "spirit" of the ancient Olympic Games that had been corrupted by the influence of money and politics. See M. Finley & H. Pleket, The Olympic Games: The First Thousand Years 4 (1976).[9] De Coubertin thus formed the IOC, that has established elaborate rules and procedures for the conduct of the modern Olympics. See Olympic Charter, Rules 26–69 (1985). In addition, these rules direct every national committee to protect the use of the Olympic flag, symbol, flame, and motto from unauthoruse. *Id.*, Bye-laws to Rules 6 and 53.[10] Under the IOC

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[8] This grant by statute of exclusive use of distinctive words and symbols by Congress is not unique. Violation of some of these statutes may result in criminal penalties. See, *e. g.*, 18 U. S. C. § 705 (veterans' organizations); § 706 (American National Red Cross); § 707 (4-H Club); § 711 ("Smokey Bear"); § 711a ("Woodsy Owl"). See also *FTC* v. *A. P. W. Paper Co.*, 328 U. S. 193 (1946) (reviewing application of Red Cross statute). Others, like the USOC statute, provide for civil enforcement. See, *e. g.*, 36 U. S. C. § 18c (Daughters of the American Revolution); § 27 (Boy Scouts); § 36 (Girl Scouts); § 1086 (Little League Baseball); § 3305 (1982 ed., Supp. III) (American National Theater and Academy).

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[9] The ancient Olympic Games were held from 776 B.C. until A.D. 393, when they were abolished by the Roman Emperor Theodosius I. The Olympic Games were the most important in a "circuit" of sporting festivals. The "circuit" also included the Pythian Games at Delphi, the Nemean Games at Nemea, and the Isthmian Games at Corinth. As these sporting festivals grew in importance, athletes turned from amateurs to true professionals, training all year and receiving substantial gifts and money from individuals and from their home cities. See M. Finley & H. Pleket, The Olympic Games: The First Thousand Years 68–82 (1976); 25 Encyc. Brit. 198 (15th ed. 1984).

[10] The Olympic flag was presented by Baron De Coubertin at the Congress of Paris in 1914. It has a white background with five interlocking rings in the center. The rings, in the colors blue, yellow, black, green, and red, in that order, "symbolize the union of the five continents and the meeting of athletes from all over the world at the Olympic Games in a spirit of fair and frank competition and good friendship, the ideal preached by Baron de Coubertin." Olympic Charter, Rule 6 (1985). The Olympic

Charter, the USOC is the national olympic committee for the United States with the sole authority to represent the United States at the Olympic Games.[11] Pursuant to this authority, the USOC has used the Olympic words and symbols extensively in this country to fulfill its object under the Olympic Charter of "ensur[ing] the development and safeguarding of the Olympic Movement and sport." *Id.*, Rule 24.

The history of the origins and associations of the word "Olympic" demonstrates the meritlessness of the SFAA's contention that Congress simply plucked a generic word out of the English vocabulary and granted its exclusive use to the USOC. Congress reasonably could find that since 1896, the word "Olympic" has acquired what in trademark law is known as a secondary meaning—it "has become distinctive of [the USOC's] goods in commerce." Lanham Act, § 2(f), 15 U. S. C. § 1052(f). See *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S., at 194. The right to adopt and use such a word "to distinguish the goods or property [of] the person whose mark it is, to the exclusion of use by all other persons, has been long recognized." *Trade-Mark Cases, supra,* at 92. Because Congress reasonably could conclude that the USOC has distinguished the word "Olympic" through its own efforts, Congress' decision to grant the USOC a limited property right in the word "Olympic" falls

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rings alone are the Olympic symbol. *Ibid.* The Olympic flame is formally lit in Olympia under the auspices of the IOC. The Olympic motto is "Citius, Altius, Fortius," meaning "Faster, Higher, Stronger," and "expresses the aspirations of the Olympic Movement." *Ibid.* The motto originated at an international conference on the principles of amateurism in sports organized by De Coubertin and held in 1894 at the Sorbonne in Paris. A French delegate, Père Henri-Martin Didon suggested as a motto the words engraved on the entrance to his lycée (school), Albert le Grand. Shortly thereafter, De Coubertin founded the IOC, which adopted this motto. A. Guttmann, The Games Must Go On 13–14 (1984).

[11] The USOC was formally organized in 1921, replacing the more informally organized American Olympic Committee. The USOC received its first corporate charter in 1950.

within the scope of trademark law protections, and thus certainly within constitutional bounds.

B

Congress also acted reasonably when it concluded that the USOC should not be required to prove that an unauthorized use of the word "Olympic" is likely to confuse the public.[12] To the extent that § 110 applies to uses "for the purpose of trade [or] to induce the sale of any goods or services," 36 U. S. C. § 380(a), its application is to commercial speech. Commercial speech "receives a limited form of First Amendment protection." *Posadas de Puerto Rico Assoc.* v. *Tourism Company of Puerto Rico*, 478 U. S. 328, 340 (1986); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 562–563 (1980). Section 110 also allows the USOC to prohibit the use of "Olympic" for promotion of theatrical and athletic events. Although many of these promotional uses will be commercial speech, some uses may go beyond the "strictly business" context. See *Friedman* v. *Rogers*, 440 U. S. 1, 11 (1979). In this case, the SFAA claims that its use of the word "Olympic" was intended to convey a political statement about the status of homosexuals in society.[13] Thus, the SFAA claims that in this case § 110 suppresses political speech.

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[12] To the extent that § 110 regulates confusing uses, it is within normal trademark bounds. The Government constitutionally may regulate "deceptive or misleading" commercial speech. *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976); *Friedman* v. *Rogers*, 440 U. S. 1, 9–10 (1979).

[13] According to the SFAA's president, the Gay Olympic Games would have offered three "very important opportunities":

"1) To provide a healthy recreational alternative to a suppressed minority.

"2) To educate the public at large towards a more reasonable characterization of gay men and women.

"3) To attempt, through athletics, to bring about a positive and gradual assimilation of gay men and women, as well as gays and non-gays, and to

By prohibiting the use of one word for particular purposes, neither Congress nor the USOC has prohibited the SFAA from conveying its message. The SFAA held its athletic event in its planned format under the names "Gay Games I" and "Gay Games II" in 1982 and 1986, respectively. See n. 2, *supra*. Nor is it clear that § 110 restricts purely expressive uses of the word "Olympic."[14] Section 110 restricts only the manner in which the SFAA may convey its message. The restrictions on expressive speech properly are characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities.[15] The ap-

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diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation." App. 93.

His expectations "were that people of all persuasions would be drawn to the event because of its Olympic format and that its nature of 'serious fun' would create a climate of friendship and co-operation[;] false images and misconceptions about gay people would decline as a result of a particpatory *[sic]* educational process, and benefit ALL communities." *Id.*, at 93–94. He thought "[t]he term 'Olympic' best describe[d] [the SFAA's] undertaking" because it embodied the concepts of "peace, friendship and positive social interaction." *Id.*, at 99.

[14] One court has found that § 110 does not prohibit the use of the Olympic logo of five interlocking rings and the Olympic torch on a poster expressing opposition to the planned conversion of the Olympic Village at Lake Placid, New York, into a prison. The court found that the use of the symbols did not fit the commercial or promotional definition of uses in § 110. *Stop the Olympic Prison* v. *United States Olympic Committee*, 489 F. Supp. 1112, 1118–1121 (SDNY 1980).

[15] JUSTICE BRENNAN finds the Act unconstitutionally overbroad. But on its face, it applies primarily to commercial speech, to which the application of the overbreadth doctrine is highly questionable. See *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 462, n. 20 (1978) (citing *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380 (1977)). There is no basis in the record to believe that the Act will be interpreted or applied to infringe significantly on noncommercial speech rights. The application of the Act to the SFAA is well within constitutional bounds, and the extent to which the Act may be read to apply to noncommercial speech is limited. We find no "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 801

propriate inquiry is thus whether the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial governmental interest. *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968).[16]

One reason for Congress to grant the USOC exclusive control of the word "Olympic," as with other trademarks, is to ensure that the USOC receives the benefit of its own efforts so that the USOC will have an incentive to continue to produce a "quality product," that, in turn, benefits the public. See 1 J. McCarthy, Trademarks and Unfair Competition §2:1, pp. 44–47 (1984). But in the special circumstance of the USOC, Congress has a broader public interest in promoting, through the activities of the USOC, the participation of amateur athletes from the United States in "the great four-yearly sport festival, the Olympic Games." Olympic Charter, Rule 1 (1985). The USOC's goal under the Olympic Charter, Rule 24(B), is to further the Olympic movement, that has as its aims: "to promote the development of those physical and moral qualities which are the basis of sport"; "to educate young people through sport in a spirit of better understanding between each other and of friendship, thereby helping to build a better and more peaceful world"; and "to spread the Olympic principles throughout the world, thereby creating international goodwill." *Id.*, Rule 1. See also *id.*, Rule 11 (aims of the IOC). Congress' interests in promoting the USOC's activities include these purposes as well as those

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(1984). Accordingly, we decline to apply the overbreadth doctrine to this case.

[16] A restriction on nonmisleading commercial speech may be justified if the government's interest in the restriction is substantial, directly advances the government's asserted interest, and is no more extensive than necessary to serve the interest. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 566 (1980). Both this test and the test for a time, place, or manner restriction under *O'Brien* require a balance between the governmental interest and the magnitude of the speech restriction. Because their application to these facts is substantially similar, they will be discussed together.

specifically enumerated in the USOC's charter.[17] Section 110 directly advances these governmental interests by supplying the USOC with the means to raise money to support

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[17] The objects and purposes of the USOC are to:

"(1) establish national goals for amateur athletic activities and encourage the attainment of those goals;

"(2) coordinate and develop amateur athletic activity in the United States directly relating to international amateur athletic competition, so as to foster productive working relationships among sports-related organizations;

"(3) exercise exclusive jurisdiction, either directly or through its constituent members of committees, over matters pertaining to the participation of the United States in the Olympic Games and the Pan-American Games, including the representation of the United States in such games, and over the organization of the Olympic Games and the Pan-American Games when held in the United States;

"(4) obtain for the United States, either directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each competition and event of the Olympic Games and of the Pan-American Games;

"(5) promote and support amateur athletic activities involving the United States and foreign nations;

"(6) promote and encourage physical fitness and public participation in amateur athletic activities;

"(7) assist organizations and persons concerned with sports in the development of amateur athletic programs for amateur athletes;

"(8) provide for the swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition;

"(9) foster the development of amateur athletic facilities for use by amateur athletes and assist in making existing amateur athletic facilities available for use by amateur athletes;

"(10) provide and coordinate technical information on physical training, equipment design, coaching, and performance analysis;

"(11) encourage and support research, development, and dissemination of information in the areas of sports medicine and sports safety;

"(12) encourage and provide assistance to amateur athletic activities for women;

"(13) encourage and provide assistance to amateur athletic programs and competition for handicapped individuals, including, where feasible, the

the Olympics and encourages the USOC's activities by ensuring that it will receive the benefits of its efforts.

The restrictions of § 110 are not broader than Congress reasonably could have determined to be necessary to further these interests. Section 110 primarily applies to all uses of the word "Olympic" to induce the sale of goods or services. Although the Lanham Act protects only against confusing uses, Congress' judgment respecting a certain word is not so limited. Congress reasonably could conclude that most commercial uses of the Olympic words and symbols are likely to be confusing. It also could determine that unauthorized uses, even if not confusing, nevertheless may harm the USOC by lessening the distinctiveness and thus the commercial value of the marks. See Schechter, The Rational Basis of Trademark Protection, 40 Harv. L. Rev. 813, 825 (1927) (one injury to a trademark owner may be "the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name" by nonconfusing uses).

In this case, the SFAA sought to sell T-shirts, buttons, bumper stickers, and other items, all emblazoned with the title "Gay Olympic Games." The possibility for confusion as to sponsorship is obvious. Moreover, it is clear that the SFAA sought to exploit the "commercial magnetism," see *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 316 U. S. 203, 205 (1942), of the word given value by the USOC. There is no question that this unauthorized use could undercut the USOC's efforts to use, and sell the right to use, the word in the future, since much of the word's value comes from its limited use. Such an adverse effect on the USOC's activities is directly contrary to Congress' interest.

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expansion of opportunities for meaningful participation by handicapped individuals in programs of athletic competition for able-bodied individuals; and

"(14) encourage and provide assistance to amateur athletes of racial and ethnic minorities for the purpose of eliciting the participation of such minorities in amateur athletic activities in which they are underrepresented." 36 U. S. C. § 374.

Even though this protection may exceed the traditional rights of a trademark owner in certain circumstances, the application of the Act to this commercial speech is not broader than necessary to protect the legitimate congressional interest and therefore does not violate the First Amendment.

Section 110 also extends to promotional uses of the word "Olympic," even if the promotion is not to induce the sale of goods. Under § 110, the USOC may prohibit purely promotional uses of the word only when the promotion relates to an athletic or theatrical event. The USOC created the value of the word by using it in connection with an athletic event. Congress reasonably could find that use of the word by other entities to promote an athletic event would directly impinge on the USOC's legitimate right of exclusive use. The SFAA's proposed use of the word is an excellent example. The "Gay Olympic Games" were to take place over a 9-day period and were to be held in different locations around the world. They were to include a torch relay, a parade with uniformed athletes of both sexes divided by city, an "Olympic anthem" and "Olympic Committee," and the award of gold, silver, and bronze medals, and were advertised under a logo of three overlapping rings. All of these features directly parallel the modern-day Olympics, not the Olympic Games that occurred in ancient Greece.[18] The image the SFAA sought to invoke was exactly the image carefully cultivated by the USOC. The SFAA's expressive use of the word cannot be divorced from the value the USOC's efforts have given to it. The mere fact that the SFAA claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to "appropriat[e] to itself the harvest of those who have sown." *International News Service* v. *Associated Press*, 248 U. S., at 239–240.[19] The USOC's right to prohibit use of the word "Olympic" in the promotion of athletic events is at the core of its legitimate property right.[20]

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[18] The ancient Olympic Games lasted 5 days, whereas the modern Olympics last for 10 days. The ancient Games always took place in Olympia in southern Greece; the modern Olympic Games normally move from city to city every four years. (As an effort to reduce nationalism, cities, as opposed to countries, host the modern Olympic Games.) In ancient Greece there may have been a burning fire for religious sacrifice, since the Olympic Games were part of a religious festival. See The Odes of Pindar, Olympia 8, ll. 1–9, p. 25 (R. Lattimore transl., 2d ed. 1976). The torch relay, however, was an innovation of the modern Olympic Committee. The closest parallel to the modern opening parade was the opening of the ancient Games with the chariot race. As the chariots entered the arena and passed the judges, a herald called out the names of the owner, his father,

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and his city. See Finley & Pleket, *supra* n. 9, at 27. There was no general parade of athletes by locality, as in the modern Games, and the athletes were naked, not uniformed. Athletes were eligible only if they were male, freeborn Greeks. There is no indication that the ancient Olympics included an "Olympic anthem" or were organized by an entity called an "Olympic Committee." The awards in ancient Greece were wreaths of wild olive, rather than the gold, silver, and bronze medals presented at the modern Olympics. The logo of overlapping rings was created by the International Olympic Committee. See n. 10, *supra*. See generally The Olympics: A Book of Lists 10–13 (J. Beilenson & N. Beilenson eds. 1984); Finley & Pleket, *supra* n. 8; 25 Encyc. Brit. 197–201 (15th ed. 1984).

[19] The SFAA claims a superior right to the use of the word "Olympic" because it is a nonprofit corporation and its athletic event was not organized for the primary purpose of commercial gain. But when the question is the scope of a legitimate property right in a word, the SFAA's distinction is inapposite. As this Court has noted in the analogous context of "fair use" under the Copyright Act:

"The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the [protected] material without paying the customary price." *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 562 (1985).

Here, the SFAA's proposed use of the word "Olympic" was a clear attempt to exploit the imagery and goodwill created by the USOC.

[20] Although a theatrical production is not as closely related to the primary use of the word by the USOC as is an athletic event, Congress reasonably could have found that when the word "Olympic" is used to promote such a production, it would implicate the value given to the word by the USOC.

IV

The SFAA argues that even if the exclusive use granted by § 110 does not violate the First Amendment, the USOC's enforcement of that right is discriminatory in violation of the Fifth Amendment.[21] The fundamental inquiry is whether the USOC is a governmental actor to whom the prohibitions of the Constitution apply.[22] The USOC is a "private corporatio[n] established under Federal law." 36 U. S. C. § 1101(46).[23] In the Act, Congress granted the USOC a corporate charter, § 371, imposed certain requirements on the USOC,[24] and provided for some USOC funding through exclusive use of the Olympic words and symbols, § 380, and through direct grants.[25]

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[21] The SFAA invokes the Fourteenth Amendment for its discriminatory enforcement claim. The Fourteenth Amendment applies to actions by a State. The claimed association in this case is between the USOC and the Federal Government. Therefore, the Fourteenth Amendment does not apply. The Fifth Amendment, however, does apply to the Federal Government and contains an equal protection component. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). "This Court's approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975). See *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*. Petitioners raised the issue of discriminatory enforcement in their petition for certiorari, and both petitioners and respondents have briefed the issue fully. Accordingly, we address the claim as one under the Fifth Amendment.

[22] Because we find no governmental action, we need not address the merits of the SFAA's discriminatory enforcement claim. We note, however, that the SFAA's claim of discriminatory enforcement is far from compelling. As of 1982 when this suit began, the USOC had brought 22 oppositions to trademark applications and one petition to cancel. App. 61. For example, the USOC successfully prohibited registration of the mark "Golden Age Olympics." *Id.*, at 383. The USOC also litigated numerous suits prior to bringing this action, prohibiting use of the Olympic words and symbols by such entities as the National Amateur Sports Foundation, *id.*, at 392, a shoe company, *id.*, at 395, the International Federation of Body Builders, *id.*, at 443, and a bus company, *id.*, at 439. Since 1982, the USOC has brought a number of additional suits against various companies and the March of Dimes Birth Defects Foundation, *id.*, at 437, and Brief for Respondents 41, n. 58. The USOC has authorized the use of the word "Olympic" to organizations that sponsor athletic competitions and events for handicapped persons ("Special Olympics") and for youth ("Junior Olympics" and "Explorer Olympics"). App. 33, 181. Both of these uses directly relate to a purpose of the USOC established by its charter. See 36 U. S. C. §§ 374(7), (13), reprinted *supra*, at 538–539, n. 17. The USOC

The fact that Congress granted it a corporate charter does not render the USOC a Government agent. All corporations

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has not consented to any other uses of the word in connection with athletic competitions or events. App. 33.

The USOC necessarily has discretion as to when and against whom it files opposition to trademark applications, and when and against whom it institutes suits. The record before us strongly indicates that the USOC has acted strictly in accord with its charter and that there has been no actionable discrimination.

[23] As such, the USOC is listed with 69 other federally created private corporations such as the American Legion, Big Brothers—Big Sisters of America, Daughters of the American Revolution, Veterans of Foreign Wars of the United States, the National Academy of Sciences, and the National Ski Patrol System, Inc. 36 U. S. C. § 1101. It hardly need be said that if federally created private corporations were to be viewed as governmental rather than private actors, the consequences would be far reaching. Apart from subjecting these private entities to suits under the equal protection component of the Due Process Clause of the Fifth Amendment, presumably—by analogy—similar types of nonprofit corporations established under state law could be viewed as governmental actors subject to such suits under the Equal Protection Clause of the Fourteenth Amendment.

[24] For example, the USOC may amend its constitution only after providing an opportunity for notice and hearing, § 375(b); the USOC must allow for reasonable representation in its membership of certain groups, § 376(b); the USOC must remain nonpolitical, § 377; and the USOC must report on its operations and expenditures of grant moneys to Congress each year, § 382a.

[25] The USOC may apply to the Secretary of Commerce for yearly grants not to exceed a total of $16 million, § 384(a), but it has never done so. See Brief for Respondents 46. The only direct federal funding that the USOC has received is a $10 million grant in 1980, characterized by Congress as "a form of disaster payment" to help the USOC recover from the losses resulting from the boycott of the Moscow Olympics. See S. Rep. No. 96–829, p. 241 (1980); Act of July 8, 1980, 94 Stat. 857, 898.

act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government. See *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974). Nor is the fact that Congress has granted the USOC exclusive use of the word "Olympic" dispositive. All enforceable rights in trademarks are created by some governmental act, usually pursuant to a statute or the common law. The actions of the trademark owners nevertheless remain private. Moreover, the intent on the part of Congress to help the USOC obtain funding does not change the analysis. The Government may subsidize private entities without assuming constitutional responsibility for their actions. *Blum* v. *Yaretsky*, 457 U. S. 991, 1011 (1982); *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 840 (1982).

This Court also has found action to be governmental action when the challenged entity performs functions that have been "'traditionally the *exclusive* prerogative'" of the Federal Government. *Id.*, at 842 (quoting *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 353; quoted in *Blum* v. *Yaretsky*, *supra*, at 1011) (emphasis added by the *Rendell-Baker* Court). Certainly the activities performed by the USOC serve a national interest, as its objects and purposes of incorporation indicate. See n. 17, *supra*. The fact "[t]hat a private entity performs a function which serves the public does not make its acts [governmental] action." *Rendell-Baker* v. *Kohn*, *supra*, at 842. The Amateur Sports Act was enacted "to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States." House Report, at 8. See *Oldfield* v. *Athletic Congress*, 779 F. 2d 505 (CA9 1985) (citing S. Rep. No. 95-770, pp. 2-3 (1978)). The Act merely authorized the

USOC to coordinate activities that always have been performed by private entities.[26] Neither the conduct nor the coordination of amateur sports has been a traditional governmental function.[27]

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[26] The Commission that recommended the current USOC powers "made it clear that it did not want the Federal Government directing amateur athletics in this country." House Report, at 9.

[27] The dissent does not rely on the fact that the USOC is chartered by Congress to find governmental action in this case. *Post*, at 548–560. JUSTICE BRENNAN attempts to distinguish the USOC from other private corporations that are chartered by Congress on the ground that the USOC performs the "distinctive, traditional governmental function" of "represent[ing] this Nation to the world community." *Post*, at 550. But absent the additional element of governmental control, this representational function can hardly be called traditionally governmental. All sorts of private organizations send "national representatives" to participate in world competitions. Although many are of interest only to a select group, others, like the Davis Cup Competition, the America's Cup, and the Miss Universe Pageant, are widely viewed as involving representation of our country. The organizations that sponsor United States participation in these events all perform "national . . . representational" as well as "administrative [and] adjudicative role[s]," see *post*, at 555, in selecting and presenting the national representatives.

As with the corporate charter, the dissent acknowledges that the representational role of the USOC is not dispositive. *Post*, at 553. According to the dissent, the Olympic Games are "unique [because] at stake are significant national interests that stem not only from pageantry but from politics." *Post*, at 551. The dissent then relies primarily on the sequence of events preceding the USOC's decision not to send athletes to the 1980 summer Olympics as demonstrating "the impact and interrelationship of USOC decisions on the definition and pursuit of the national interest." *Post*, at 553. But the governmental influence on that particular decision of the USOC is hardly representative in view of the absence of such influence on the vast majority of USOC decisions. Moreover, even the unique sequence of events in 1980 confirms that the USOC cannot properly be considered a governmental agency. Although the President and Congress indicated their view that United States athletes should not go to the Moscow Olympics, this was not the end of the matter. The President thought it would be necessary to take "legal actions [if] necessary" to prevent the USOC from sending a team to Moscow. See 1 Public Papers of the Presi-

Most fundamentally, this Court has held that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum* v. *Yaretsky*, *supra*, at 1004; *Rendell-Baker* v. *Kohn*, *supra*, at 840. See *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 166 (1978); *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 357; *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 173 (1972); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144,

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dents, Jimmy Carter 1980–1981, p. 636 (1981). Previously, the Attorney General had indicated that the President believed that he had the power under the Emergency Powers Act, 50 U. S. C. § 1701, to bar travel to an area that he considered to pose a threat of national emergency. See Washington Post, Apr. 11, 1980, p. A1. The President's statement indicated a clear recognition that neither he nor Congress could control the USOC's actions directly. A District Court, confronted with the question whether the decision not to send athletes to the 1980 Olympics was state action, noted:

"The USOC is an independent body, and nothing in its chartering statute gives the federal government the right to control that body or its officers. Furthermore, the facts here do not indicate that the federal government was able to exercise any type of '*de facto*' control over the USOC. The USOC decided by a secret ballot of its House of Delegates. The federal government may have had the power to prevent the athletes from participating in the Olympics even if the USOC had voted to allow them to participate, but it did not have the power to make them vote in a certain way. All it had was the power of persuasion. We cannot equate this with control. To do so in cases of this type would be to open the door and usher the courts into what we believe is a largely nonjusticiable realm, where they would find themselves in the untenable position of determining whether a certain level, intensity, or type of 'Presidential' or 'Administrative' or 'political' pressure amounts to sufficient control over a private entity so as to invoke federal jurisdiction." *DeFrantz* v. *United States Olympic Committee*, 492 F. Supp. 1181, 1194 (DC), aff'd mem., 226 U. S. App. D. C. 210, 701 F. 2d 221 (1980).

In sum, we remain unconvinced that the functions that the USOC performs can be viewed as "governmental" action.

170 (1970). The USOC's choice of how to enforce its exclusive right to use the word "Olympic" simply is not a governmental decision.[28] There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right. At most, the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise "[m]ere approval of or acquiescence in the initiatives" of the USOC. *Blum* v. *Yaretsky*, 457 U. S., at 1004–1005. This is not enough to make the USOC's actions those of the Government. *Ibid.* See *Flagg Bros., Inc.* v. *Brooks*, *supra*, at 164–165; *Jackson* v. *Metropolitan Edison Co.*, 419 U. S., at 357.[29] Because the USOC is not a governmental actor, the SFAA's claim that the USOC has enforced its rights in a discriminatory manner must fail.[30]

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[28] In fact, the Olympic Charter provides that the USOC "must be autonomous and must resist all pressures of any kind whatsoever, whether of a political, religious or economic nature." Rule 24.

[29] For all of the same reasons indicated above, we reject the SFAA's argument that the United States Government should be viewed as a "joint participant" in the USOC's efforts to enforce its right to use the word "Olympic." See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961). The SFAA has failed to demonstrate that the Federal Government can or does exert any influence over the exercise of the USOC's enforcement decisions. Absent proof of this type of "close nexus between the [Government] and the challenged action of the [USOC]," the challenged action may not be "fairly treated as that of the [Government] itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S., at 351.

[30] In their petition for certiorari, petitioners argued only that because the USOC is a "state actor" it is prohibited from "selecting among diverse potential users of the word 'Olympic', based upon speech-suppressing and invidiously discriminatory motives." Pet. for Cert. i. The SFAA now argues that under *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), the District Court's entry of the injunction prohibiting the SFAA's use of the word "Olympic" constitutes governmental action sufficient to require a constitutional inquiry into the USOC's motivation in seeking the injunction. This new theory of governmental action is not fairly encompassed within the questions presented and thus is not properly before the Court. See this Court's Rule 21.1(a).

V

Accordingly, we affirm the judgment of the Court of Appeals for the Ninth Circuit.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, concurring in part and dissenting in part.

I agree with the Court's construction of § 110 of the Amateur Sports Act, 92 Stat. 3048, 36 U. S. C. § 380, and with its holding that the statute is "within constitutional bounds." *Ante*, at 535. Therefore, I join Parts I through III of the Court's opinion. But largely for the reasons explained by JUSTICE BRENNAN in Part I–B of his dissenting opinion, I believe the United States Olympic Committee and the United States are joint participants in the challenged activity and as such are subject to the equal protection provisions of the Fifth Amendment. Accordingly, I would reverse the Court of Appeals' finding of no Government action and remand the case for determination of petitioners' claim of discriminatory enforcement.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court wholly fails to appreciate both the congressionally created interdependence between the United States Olympic Committee (USOC) and the United States, and the significant extent to which § 110 of the Amateur Sports Act of 1978, 36 U. S. C. § 380, infringes on noncommercial speech. I would find that the action of the USOC challenged here is Government action, and that § 110 is both substantially overbroad and discriminates on the basis of content. I therefore dissent.

I

For two independent reasons, the action challenged here constitutes Government action. First, the USOC performs important governmental functions and should therefore be considered a governmental actor. Second, there exists "a sufficiently close nexus between the [Government] and the challenged action" of the USOC that "the action of the latter may be fairly treated as that of the [Government] itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974).

A

Examination of the powers and functions bestowed by the Government upon the USOC makes clear that the USOC must be considered a Government actor. It is true, of course, that the mere "fact '[t]hat a private entity performs a function *which serves the public* does not make its acts [governmental]'" in nature. *Ante*, at 544 (quoting *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 842 (1982) (emphasis added)). Such a definition, which might cover "all . . . regulated businesses providing arguably essential goods and services," would sweep too broadly. *Jackson*, *supra*, at 354.

The Court has repeatedly held, however, that "when private individuals or groups *are endowed by the State* with powers or functions *governmental* in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans* v. *Newton*, 382 U. S. 296, 299 (1966) (emphasis added). See *Terry* v. *Adams*, 345 U. S. 461 (1953) (private political association and its elections constitute state action); *Marsh* v. *Alabama*, 326 U. S. 501 (1946) (privately owned "company town" is a state actor). Moreover, a finding of government action is particularly appropriate when the function performed is "traditionally the exclusive prerogative" of government. *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 353. Patently, Congress has endowed the USOC with traditional governmental powers that enable it to perform a governmental function.[1]

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[1] The Court argues that the USOC's function of coordinating private athletic organizations is not one "traditionally the exclusive prerogative" of government, *Jackson* v. *Metropolitan Edison Co.*, 419 U. S., at 353. See *ante*, at 544. Even if the coordination function were the only function delegated to the USOC, which it is not (see discussion of representation function, text this page and *infra*, at 550–553), the Court's argument would

The USOC performs a distinctive, traditional governmental function: it represents this Nation to the world community. The USOC is, by virtue of 36 U. S. C. §§374 and 375, our country's exclusive representative to the International Olympic Committee (IOC), a highly visible and influential international body. The Court overlooks the extraordinary representational responsibility that Congress has placed on the USOC. As the Olympic Games have grown in international visibility and importance, the USOC's role as our national representative has taken on increasing significance.

Although the Olympic ideals are avowedly nonpolitical, Olympic participation is inescapably nationalist. Membership in the IOC is structured not according to athletes or sports, but nations.[2] The athletes the USOC selects are viewed, not as a group of individuals who coincidentally are from the United States, but as the team of athletes that represents our Nation. During the House debates on the Amateur Sports Act, Representative Michel expressed it well:

> "American athletes will go into these same [1980 Olympic] games as products of our way of life. I do not believe that it is the purpose of the games to set one way

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not be dispositive. Although the Court has in the past implied that a finding of governmental action likely follows when a private party performs a function that is traditionally the exclusive prerogative of government, *e. g.*, *Jackson*, *supra*, at 352–353, the Court has never expressly limited the definition of government function to such circumstances. Such a limitation would be most imprudent, for it would freeze into law a static conception of government, and our judicial theory of government action would cease to resemble contemporary experience. This case illustrates the point. As discussed, *infra*, at 554–556, Congress reshaped the USOC in 1978 in part to fulfill a role—that of exclusive national coordinator for all amateur athletics related to international competition—which no private party had ever filled.

[2] See IOC Rule 24(B) ("NOCs [National Olympic Committees] shall be the sole authorities responsible for *the representation of their respective countries* at the Olympic Games as well as at other events held under the patronage of the IOC"), reprinted in International Olympic Committee, Olympic Charter 16 (1985) (emphasis added).

> of life against another. But it cannot be denied that spectators, both in Moscow and all over the world, certainly will have such a thought in mind when the events take place. So it would be good for our nation and for the athletes who represent us if the cooperation, spirit of individuality, and personal freedom that are the great virtues of our system are allowed to exert their full influence in the games." 124 Cong. Rec. 31662 (1978).

Every aspect of the Olympic pageant, from the procession of athletes costumed in national uniform, to the raising of national flags and the playing of national anthems at the medal ceremony, to the official tally of medals won by each national team, reinforces the national significance of Olympic participation. Indeed, it was the perception of shortcomings in the *Nation's* performance that led to the Amateur Sports Act of 1978. In the words of the President's Commission, "[t]he fact is that *we* are competing less well and *other nations* competing more successfully because other nations have established excellence in international athletics as a national priority." 1 Final Report of the President's Commission on Olympic Sports 1975–1977, p. ix (1977) (Final Report) (emphasis added).

Private organizations sometimes participate in international conferences resplendent with billowing flags. But the Olympic Games are unique: at stake are significant national interests that stem not only from pageantry but from politics. Recent experience illustrates the inherent interdependence of national political interests and the decisions of the USOC. In his State of the Union Address of January 23, 1980 (a forum, one need hardly add, traditionally reserved for matters of national import), the President announced his opposition to American participation in the 1980 summer Olympic Games in Moscow.[3] The opposition was not premised on, *e. g.*, the financial straits of a private corporation, but on the implications of participation for American foreign policy. Echoing the President's concerns, the House of Representatives passed a resolution expressing its opposition to American participation.[4] In a speech on April 10, 1980, the President threatened to take "legal actions [if] necessary to enforce the decision not to send a team to Moscow."[5] Shortly thereafter, with the national and international stakes of the USOC's decision set forth by the President and Congress, and with reports in the press of possible cuts in federal aid to the USOC,[6] the USOC announced that the United States would not participate in the 1980 Olympic Games.[7]

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[3] The President's Address is reprinted in 1 Public Papers of the Presidents, Jimmy Carter 1980–1981, p. 196 (1981) (Public Papers), and also in 126 Cong. Rec. 380 (1980).

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[4] See *id.*, at 562–580. The comments of Representative Ritter during the debate are illuminating: "Moving or boycotting the Olympics is a strong step in the right direction, but it must be seen by all Americans as part of an overall strategy to deal intelligently with the U. S. S. R." *Id.*, at 575.

[5] The President explained: "Under Olympic principles—and this is very important—*athletes represent their nations*. Athletes who are not part of a national team cannot compete in the Olympics. The United States does not wish to be represented in a host country that is invading and subjugating another nation in direct violation of human decency and international law. If legal actions are necessary to enforce the decision not to send a team to Moscow, then I will take those legal actions." Public Papers 636 (emphasis added).

[6] See Dewar & Scannell, White House Looks at USOC's Tax Status, Washington Post, Apr. 9, 1980, pp. A1, A14. See also 6 The Olympian 5 (March 1980) (reprinting President Carter's letter to the USOC, written in his capacity as "Honorary President of the United States Olympic Committee," in which the President explains the "deeper issues . . . at stake" in the USOC's decision); Paul, Historic decision at Colorado Springs means USA will not participate at Moscow, 6 The Olympian 4 (May/June 1980) (hereafter Historic decision) (describing meetings of USOC officials with "Cabinet members and military leaders" to discuss question of United States participation in 1980 Olympic Games).

[7] The Resolution adopted by the USOC House of Delegates on April 12, 1980, stated in part: "Resolved, that since the President of the United States has advised the United States Olympic Committee that in light of international events the national security of the country is threatened, the USOC has decided not to send a team to the 1980 Summer Games in Moscow." 6 The Olympian 6 (May/June 1980). See also Historic decision 4 (quoting USOC President Kane's statment "[o]f course, the USOC will ac-

Although the lesson had been learned long before 1980,[illegible] this sequence of events laid bare the impact and interrelationship of USOC decisions on the definition and pursuit of the national interest.

There is more to the USOC's public role than representation. The current USOC was born out of governmental dissatisfaction with the performance of the United States in international athletic competition. This dissatisfaction led Congress to grant the USOC unprecedented administrative authority over all private American athletic organizations relating to international competition. The legislative history reveals, contrary to the Court's assumption, *ante*, at 544–545, that no actor in the private sector had ever performed this function, and indeed never could perform it absent enabling legislation.

In 1975, President Ford established a Commission on Olympic Sports to investigate the deteriorating performance of America's athletes at the Olympic Games, and to recom-

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cept any decision the President makes in view of his analysis of what is best for the country").

[illegible] The national political ramifications of the USOC's decisions also were evident in 1968, when the USOC suspended American medalists Tommie Smith and John Carlos from the United States Olympic Team. The athletes had called attention to racial troubles in America by raising black-gloved fists during the medal ceremony. D. Chester, The Olympic Games Handbook 177 (1975).

The international political impact of the Games is an inescapable fact of the modern era. For example, Jesse Owens' dramatic performance in the 1936 Olympic Games was widely perceived as a rebuke to Hitler and Nazism. *Id.*, at 90-94. The labeling of the 1960 Taiwanese team as representative of "Formosa" rather than of China prompted one member to march in protest. *Id.*, at 142. And the tragic, politically motivated attack on the Israeli Olympic Team in 1972, in which 11 Israeli athletes, 5 Arabs, and 1 German policeman were killed, forever dispelled any illusion that the Olympics could exist apart from the violent vicissitudes of international politics. *Id.*, at 175. As Avery Brundage recognized in 1972, "[t]he greater and more important the Olympic Games become, the more they are open to commercial, political, and . . . criminal pressure." *Ibid.*

mend solutions. The Commission traced the problems to a lack of central coordination, and "recommend[ed] the institution of a central sports organization for the United States." 1 Final Report 11–13.

In enacting the Amateur Sports Act, Congress gave life to the Commission's primary recommendation, that the USOC be restructured[9] to assume this new role of "central sports organization." See H. R. Rep. No. 95–1627, pp. 8–9 (1978). It greatly expanded the charter of the USOC, giving it "perpetual succession and power to serve as the coordinating body for amateur athletic activity in the United States directly relating to international amateur athletic competition." 36 U. S. C. § 375(a)(1). It also granted the USOC the power to recognize an organization as the "national governing body" for a particular sport, and endowed the USOC with the power to resolve all conflicts and disputes that would arise among the multitude of private organizations and individuals over which it would hold sway. See 36 U. S. C. §§ 375(a)(5), 382b.[10] Thus, in the Amateur Sports Act, Congress granted the USOC the authority and ability to govern national amateur athletics related to international competition.

The public hearing and reporting requirements of the Act reflect the public nature of the USOC's mission. Under

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[9] The Commission "gave special attention to an examination of the U. S. Olympic Committee (USOC)," and found it "to be a maddening complex of organizations . . . unwieldy in its make-up and structure." 1 Final Report 17. The Commission also found that the USOC "was not [originally] conceived to fill the role of national coordinator of amateur sports. It was simply, by virtue of its name, membership and financial ability, drawn into the vacuum created by the unmet needs in U. S. amateur sports." *Ibid.* The Commission's Final Report concluded: "It goes without saying that the *role of Congress will be crucial.* The creation of a central sports organization . . . and other recommendations will *require* Congressional approval." *Id.*, at 130 (emphasis added).

[10] See H. R. Rep. No. 95–1627, pp. 9–10 (1978) (summarizing the "enlarge[d] . . . purposes and powers of the USOC [that] permit it to carry out its expanded role").

§ 375(b)(2), the USOC may not amend its constitution or byelaws unless it "gives to all interested persons, prior to the adoption of any amendment, an opportunity to submit written data, views, or arguments concerning the proposed amendment for a period of at least 60 days after the date of publication of the notice." Similarly, the USOC may not recognize a particular amateur sports organization as the "national governing body" for that sport without first holding a public hearing on the matter. 36 U. S. C. § 391(a). The Act institutionalizes yet another public check on the USOC by requiring it annually to "transmit simultaneously to the President and to each House of Congress a detailed report of its operations for the preceding calendar year, including a full and complete statement of its receipts and expenditures and a comprehensive description of the activities and accomplishments of the [USOC] during the preceding year." 36 U. S. C. § 382a(a). The USOC must also submit annual "detailed" reports to the President and Congress on the expenditures of funds made available to it by Congress, and provide "detailed and comprehensive" descriptions of the programs it expects to finance out of Government grant money in the coming year. 36 U. S. C. §§ 382a(b), 384(b).

The function of the USOC is obviously and fundamentally different than that of the private nursing homes in *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), or the private school in *Rendell-Baker* v. *Kohn*, 457 U. S. 830 (1982), or the private Moose Lodge in *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972), or even the public utility in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974). Unlike those entities, which merely provided public services, the USOC has been endowed by the Federal Government with the exclusive power to serve a unique national, administrative, adjudicative, and representational role.[11] The better analogy, then, is to the company town in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), or to the private political party in *Terry* v. *Adams*, 345 U. S. 461 (1953). Like those entities, the USOC is a private organization on whom the Government has bestowed inherently public powers and responsibilities. Its actions, like theirs, ought to be subject to constitutional limits.

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[11] These attributes would also distinguish the USOC from most of the "69 other federally created private corporations such as the American Legion, Big Brothers — Big Sisters of America, Daughters of the American Revolu-

B

Apart from the argument that the USOC is itself a Government actor, there is a second reason to find Government action. At a minimum, this case, like *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), is one in which the Government "has so far insinuated itself into a position of interdependence with [the USOC] that it must be recognized as a joint participant in the challenged activity." *Id.*, at 725.[12]

The action at issue in *Burton* was the refusal of a private restaurant that leased space in a public parking facility to serve a black customer. Central to the Court's analysis was what later cases have termed "the symbiotic relationship" of the restaurant to the parking facility. *E. g.*, *Moose Lodge*, *supra*, at 175; *Rendell-Baker*, *supra*, at 843. This relationship provided the "sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, *supra*, at 351.

The USOC and the Federal Government exist in a symbiotic relationship sufficient to provide a nexus between the

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tion, Veterans of Foreign Wars of the United States," *ante*, at 543, n. 23, whose presumed status as private actors is not threatened by a finding of Government action here.

[12] The Court fails to mention *Burton* v. *Wilmington Parking Authority*, a case on which petitioner heavily relies. In each of the decisions principally relied on today, the Court thought it important to discuss and distinguish *Burton*. See *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 175 (1972); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357–358 (1974); *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 842–843 (1982); *Blum* v. *Yaretsky*, 457 U. S. 991, 1010–1011 (1982).

USOC's challenged action and the Government. First, as in *Burton*, the relationship here confers a variety of mutual benefits.[13] As discussed *supra*, at 553–556, the Act gave the USOC authority and responsibilities that no private organization in this country had ever held. The Act also conferred substantial financial resources on the USOC, authorizing it to seek up to $16 million annually in grants from the Secretary of Commerce, § 113(a), and affording it unprecedented power to control the use of the word "Olympic" and related emblems to raise additional funds, § 110. As a result of the Act, the United States obtained, for the first time in its history, an exclusive and effective organization to coordinate and administer all amateur athletics related to international competition, and to represent that program abroad.

Second, in the eye of the public, both national and international, the connection between the decisions of the United States Government and those of the United States Olympic Committee is profound.[14] The President of the United States has served as the Honorary President of the USOC. The national flag flies both literally and figuratively over the central product of the USOC, the United States Olympic Team. The connection is not lost on the athletes: who can imagine an Olympic hopeful postponing a lucrative professional career with the explanation, "I can't pass up this chance to represent the United States Olympic Committee"? More fundamentally, as Representative Michel observed, it is through our participation in the Games that we display "the great virtues of our system." 124 Cong. Rec. 31662 (1978).

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[13] The Court observed in *Burton* that the relationship between the public authority and the restaurant "confer[red] on each an incidental variety of mutual benefits." 365 U. S., at 724. For example, the location of both parking and dining services in one building could well generate additional demand for each service. *Ibid.* In addition, any improvements in the restaurant's leasehold would not lead to increased taxes since the fee was held by a tax-exempt agency. *Ibid.*

[14] In *Burton*, the Court also found significant evidence that would link the two actors in the public's eye. There was "the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service," *ibid.*, and the fact that "the Authority located at appropriate places [on the facility] official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags," *id.*, at 720. This evident interdependence created public perceptions of "grave injustice" that the Court could not ignore. *Id.*, at 724.

Even more importantly, there is a close financial and legislative link between the USOC's alleged discriminatory exercise of its word-use authority and the financial success of both the USOC and the Government.[15] It would certainly be "irony amounting to grave injustice" if, to finance the team that is to represent the virtues of our political system, the USOC were free to employ Government-created economic leverage to prohibit political speech. *Burton*, *supra*, at 724. Yet that is exactly what petitioners allege. In § 110 of the Act, Congress granted the USOC not a "normal trademark" but an unprecedented right of "exclusive use of the word 'Olympic' without regard to whether use of the word tends to cause confusion," and without "incorporat[ing] defenses available under the Lanham Act." *Ante*, at 530; see Part II–A, *infra*. The purpose of this grant of unique discretion was to enhance the fundraising ability of the USOC. The Court puts it well:

> "Section 110 *directly advances these governmental interests* [promoting the USOC's activities] *by supplying the USOC with the means to raise money* to support the Olympics and encourages the USOC's activities by ensuring that it will receive the benefits of its efforts." *Ante*, at 538–539 (emphasis added).[16]

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[15] In *Burton*, the Court could not "ignor[e], especially in view of [the restaurant's] affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." *Ibid.*

[16] See also *United States Olympic Committee* v. *Intelicense Corp.*, 737 F. 2d 263, 264 (CA2) (Section 110 intended to enable USOC "to safeguard

If petitioner is correct in its allegation that the USOC has used its discretion to discriminate against certain groups, then the situation here, as in *Burton*, is that "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." *Burton*, 365 U. S., at 724. Indeed, the required nexus between the challenged action and the Government appears even closer here than in *Burton*. While in *Burton* the restaurant was able to pursue a policy of discrimination because the State had failed to impose upon it a policy of nondiscrimination, the USOC could pursue its alleged policy of selective enforcement only because Congress *affirmatively* granted it power that it would not otherwise have to control the use of the word "Olympic." I conclude, then, that the close nexus between the Government and the challenged action compels a finding of Government action.

C

A close examination of the USOC and the Government thus reveals a unique interdependence between the two. Although at one time amateur sports was a concern merely of private entities, and the Olympic Games an event of significance only to individuals with a particular interest in athletic competition, that era is passed. In the Amateur Sports Act of 1978, Congress placed the power and prestige of the United States Government behind a single, central sports organization. Congress delegated to the USOC functions

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the USOC's ability to raise the financial resources that are a critical component of America's capacity to send world class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations"), cert. denied, 469 U. S. 982 (1984); *Stop The Olympic Prison* v. *United States Olympic Committee*, 489 F. Supp. 1112, 1120 (SDNY 1980) (footnote omitted) ("[S]ection [110], read as a whole, evidences a legislative intent to establish strong protection for the Olympic symbols, in part to ensure the market value of licenses for their use. Recent experience has shown such licensing to be a substantial inducement for contributions from a wide variety of commercial corporations, and the drafters of subsection (b) appear to have had this clearly in mind").

that Government actors traditionally perform—the representation of the Nation abroad and the administration of all private organizations in a particular economic sector. The representation function is of particular significance here, in my view, because an organization that need not adhere to the Constitution cannot meaningfully represent this Nation. The Government is free, of course, to "privatize" some functions it would otherwise perform. But such privatization ought not automatically release those who perform Government functions from constitutional obligations. Because the USOC performs a Government function, and because its challenged action is inextricably intertwined with the Government, I would reverse the Court of Appeals finding of no Government action, and remand to the District Court for further proceedings.[17]

II

Section 110(a)(4) prohibits "any person" from using the word "Olympic" "[w]ithout the consent of the [USOC] for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition."[18] The Court construes this section to give

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[17] Because both the Court of Appeals and the District Court found no Government action, neither evaluated petitioners' evidence regarding the USOC's policy of selective enforcement. 781 F. 2d 733, 736–737 (CA9 1986); App. 271. Although the Court recognizes this, *ante*, at 542, n. 22, it nevertheless proceeds to offer its view that petitioners' "claim of discriminatory enforcement is far from compelling." *Ibid.* At this stage of the proceedings, however, the proper forum for any such evaluation is the District Court.

[18] Section 110 of the Amateur Sports Act, 36 U. S. C. § 380, provides in part:

"Without the consent of the [USOC], any person who uses *for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition*—

. . . . .

"(3) any *trademark*, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or the [USOC]; or the USOC authority over use of the word "Olympic" which far surpasses that provided by a standard trademark. The Court ignores the serious First Amendment problems created by its interpretation. It holds that § 110(a)(4) regulates primarily commercial speech, and that this section imposes only those incidental restrictions on expressive speech necessary to further a substantial governmental interest. *Ante*, at 535–541.[19]

I disagree. The statute is overbroad on its face because it is susceptible of application to a substantial amount of noncommercial speech, and vests the USOC with unguided discretion to approve and disapprove others' noncommercial use of "Olympic." Moreover, by eliminating even noncommercial uses of a particular word, it unconstitutionally infringes on the SFAA's right to freedom of expression. The Act also restricts speech in a way that is not content neutral. The Court's justifications of these infringements on First Amendment rights are flimsy. The statute cannot be characterized as a mere regulation of the "manner" of speech, and does not serve any Government purpose that would not effectively be protected by giving the USOC a standard commercial trademark. Therefore, as construed by the Court, § 110(a)(4) cannot withstand the First Amendment challenge presented by petitioners.

A

The USOC has held a trademark in the word "Olympic" since 1896, *ante*, at 533, and § 110(a)(3) of the Amateur Sports

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"(4) the words '*Olympic*', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity;

"shall be subject to suit in a civil action by the [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946 [Lanham Act, 15 U. S. C. § 1051 *et seq.*])" (emphases added).

[19] In the Court's view, § 110(a)(4) does not necessarily extend to purely expressive speech. *Ante*, at 536, and n. 14.

Act perpetuates the USOC's protection against infringement of its trademarks. To be more than statutory surplusage, then, § 110(a)(4) must provide something more than a normal trademark. Thus, the Court finds that § 110(a)(4) grants to the USOC a novel and expansive word-use authority.[20] In my view, the Act, as interpreted by the Court, is substantially overbroad, violating the First Amendment because it prohibits "a substantial amount of constitutionally protected conduct." *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494 (1982). The Amateur Sports Act is substantially overbroad in two respects. First, it grants the USOC the remedies of a commercial trademark to regulate the use of the word "Olympic," but refuses to interpret the Act to incorporate the defenses to trademark infringement provided in the Lanham Act. These defenses are essential safeguards which prevent trademark power from infringing upon constitutionally protected speech. Second, the Court construes § 110(a)(4) to grant the USOC unconstitutional authority to prohibit use of "Olympic" in the "promotion of theatrical and athletic events," even if the promotional activities are *noncommercial* or expressive. *Ante*, at 535, 540–541.[21]

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[20] The legislative history of the Act is consistent with its plain language and indicates that Congress granted word-use authority beyond the power to enforce a trademark. Congress' purpose was to give the USOC authority "to protect certain symbols, emblems, *trademarks*, tradenames *and words* by civil action." H. R. Rep. No. 95–1627, p. 10 (1978) (emphasis added). Significantly, throughout the House Report, Congress refers to the USOC's authority over the use of "Olympic" as a matter separate from the USOC's authority to enforce its trademarks. See, *e. g.*, *id.*, at 6, 7, 10, 15, 37–38. Nowhere in the legislative history is there any hint that Congress equated the USOC's word-use authority over "Olympic" with its trademark power.

[21] In interpreting the Amateur Sports Act, the Court selectively incorporates sections of the Lanham Act. Although the Court refuses to incorporate 15 U. S. C. § 1066 (requirement of consumer confusion) and § 1115 (statutory defenses), it does appear to incorporate § 1127. *Ante*, at 531. This latter section limits the scope of trademark protection to a word "used

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The first part of § 110 prohibits use of the word "Olympic" "for the purpose of trade" or "to induce the sale of any goods or services." There is an important difference between the word-use authority granted by this portion of § 110 and a Lanham Act trademark: the former primarily affects noncommercial speech,[22] while the latter does not.[23]

Charitable solicitation and political advocacy by organizations such as the SFAA[24] may in part consist of commercial

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by a manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured or sold by others." 15 U. S. C. § 1127 (1982 ed., Supp. III). The Court does not explain, however, the inconsistency between the definition of trademark protection in § 1127 (which limits protection to commercial uses) and the scope of the protection that § 110(a)(4) grants the USOC (including the noncommercial promotion of athletic and theatrical events).

[22] As the District Court recognized:

"You're saying something that I have trouble with. You're talking Trademark Act and trademark law, trademark policies and philosophies of this country. But we have a unique situation here which takes it out of the typical trademark-type of litigation. [Section 110 of the Amateur Sports Act] imposes civil liability . . . upon any person who uses [the word "Olympic"] without U. S. O. C. consent to promote any athletic performance or competition. . . .

". . . The plaintiffs here are seeking to enforce a law . . . which creates a unique and different situation . . . ." App. 265–266.

[23] See *Friedman* v. *Rogers*, 440 U. S. 1, 11 (1979) (trademark protections only extend to "strictly business" matters and involve "a form of commercial speech and nothing more"). In no trademark case that the Court has considered have we permitted trademark protection to ban a substantial amount of noncommercial speech. See, *e. g., Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S. 189, 201 (1985) (Lanham Act provisions prevent "commercial monopolization" of descriptive language in the public domain).

[24] The SFAA engages in political advocacy and charitable solicitation, activities that are protected by the First Amendment. See *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 632 (1980) (charitable solicitation by an organization committed to political advocacy "involve[s] a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that

speech regulated by trademark law, but the expressive element of such speech has been sheltered from unconstitutional harm by Lanham Act defenses. Without them, the Amateur Sports Act prohibits a substantial amount of noncommercial speech.

Trademark protection has been carefully confined to the realm of commercial speech by two important limitations in the Lanham Act. First, the danger of substantial regulation of noncommercial speech is diminished by denying enforcement of a trademark against uses of words that are not likely "to cause confusion, to cause mistake, or to deceive." See 15 U. S. C. § 1066. Confusion occurs when consumers make an incorrect mental association between the involved commercial products or their producers. See E. Vandenburgh, Trademark Law and Procedure § 5.20, p. 139 (2d ed. 1968). In contrast, § 110(a)(4) regulates even nonconfusing uses of "Olympic." For example, it may be that while SFAA's use of the word "Olympic" would draw attention to certain similarities between the "Gay Olympic Games" and the "Olympic Games," its use might nevertheless not confuse consumers. Because § 110 does not incorporate the requirement that a defendant's use of the word be confusing to consumers, it regulates an extraordinary range of noncommercial speech.[25]

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are within the protection of the First Amendment"). It is chartered as a nonprofit, educational organization whose purpose is to inform the general public about the "gay movement" and "to diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation." App. 93, 102. The SFAA solicited charitable donations and distributed T-shirts, buttons, and posters using the word "Olympic."

[25] In its complaint, the USOC included a cause of action under § 14330 of the California Business and Professional Code (1987), which protects trademark holders against uses which dilute the value of their trademark. App. 7–14. The USOC has not explained, however, why the remedies provided by the California dilution statute are insufficient.

It is worth noting that, although some state dilution statutes do not require proof of actual confusion, they do impose other limitations that are not imposed by § 110. "The dilution doctrine cannot and should not be carried to the extreme of forbidding use of a trademark on any and all prod-

The fair-use defense also prevents the award of a trademark from regulating a substantial amount of noncommercial speech. See 15 U. S. C. § 1115(b)(4). The Lanham Act allows "the use of the name, term, or device . . . which is descriptive of and used fairly and in good faith only to describe to users the goods or services of such party." *Ibid.*[26] Again, a wide array of noncommercial speech may be characterized as merely descriptive of the goods or services of a party, and thus not intended to propose a commercial transaction. For example, the SFAA's description of its community services appears to be regulated by § 110, although the main purpose of such speech may be to educate the public about the social and political views of the SFAA. Congress' failure to incorporate this important defense in § 110(a)(4) confers an unprecedented right on the USOC. See *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S. 189, 200–201 (1985) (noting that fair-use doctrine assists in preventing the "unprecedented" creation of "an exclusive right to use language that is descriptive of a product").[27]

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ucts and services, however remote from the owner's usage." 2 J. McCarthy, Trademarks and Unfair Competition § 24:16, p. 229 (2d ed. 1984); see also 1 J. Gilson, Trademark Protection and Practice § 5.05[9], p. 5–42 (1986). Only "strong" trademarks are protected by dilution statutes, and the plaintiff's trademark must not previously have been diluted by others. 2 McCarthy, *supra*, § 24:14, p. 224; E. Vandenburgh, Trademark Law and Procedure § 5.20, p. 150 (2d ed. 1968). It is generally necessary to show similarity between trademarks and a "likelihood" of confusion. See 1 Gilson, *supra*, § 5.05[9], p. 5–42. Moreover, state dilution statutes do not generally apply to descriptive, nontrademark uses of words.

[26] It is important to note that even after a trademark has acquired secondary meaning, it may be used in a good-faith descriptive manner under the Lanham Act. See 1 McCarthy, *supra*, § 11:16, p. 475.

[27] One commentator has described the First Amendment significance of this Lanham Act defense with respect to the regulation of commercial speech:

"*Virginia Pharmacy*[, 425 U. S. 748 (1976),] and the underlying policies in favor of free commercial speech are closely parallel to those which apply to the branch of trademark law dealing with descriptive words and

In sum, while the USOC's trademark of "Olympic" allows the USOC to regulate use of the word in the "strictly business" context, the USOC's authority under § 110(a)(4) to regulate nonconfusing and good-faith descriptive uses of the word "Olympic" grants the USOC discretion to prohibit a substantial amount of noncommercial speech. Section 110(a)(4) is therefore substantially overbroad. See *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 959 (1984); *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 632 (1980).

2

A key Lanham Act requirement that limits the impact of trademarks on noncommercial speech is the rule that a trademark violation occurs only when an offending trademark is applied to *commercial* goods and services. See 15 U. S. C. §§ 1066 and 1127. The Amateur Sports Act is not similarly qualified. Section 110(a)(4) "allows the USOC to prohibit the use of 'Olympic' for promotion of theatrical and athletic events,"[28] even if such uses "go beyond the 'strictly business'

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phrases. The same or very similar policies have been followed for more than a half century by courts and legislatures applying the rule of trademark law that descriptive words and terms cannot be monopolized as trademarks. . . . Without such availability, fair and open competition might be impaired, the available vocabulary of descriptive words would be reduced, advertisers could not freely describe their products, and the public might be deprived of information necessary to make purchase decisions. . . . If the court finds . . . that defendant is using the term in a purely descriptive manner, it presumably can support its holding by reliance on the *Virginia Pharmacy* doctrine and policies." 1 Gilson, *supra*, § 5.09[5], pp. 5–88 to 5–89 (footnotes omitted).

[28] Noncommercial promotion may include critical reviews of theatrical performances, anticipatory notices and descriptions in the media of athletic competitions, and distribution of educational literature describing the sociopolitical reasons for holding the public events. See *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 580 (1980) (STEVENS, J., concurring in judgment) (promotional advertising encompasses more than commercial speech). For example, in response to the injunction, the SFAA excised the use of "Olympic" from its promotional

context." *Ante*, at 535; see also *ante*, at 540 (statute extends to promotional uses "even if the promotion is not to induce the sale of goods").[29] This provision necessarily regulates only noncommercial speech, since every possible commercial use of the word "Olympic" is regulated by preceding sections of the statute.[30]

While the USOC has unquestioned authority to enforce its "Olympic" trademark against the SFAA, § 110(a)(4) gives it additional authority to regulate a substantial amount of noncommercial speech that serves to promote social and political ideas. The SFAA sponsors a number of nonprofit-making theatrical and athletic events, including concerts, film screenings, and plays.[31] These public events are aimed at educating the public about society's alleged discrimination based on

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and educational literature, cautioned its phone operators to refrain from using the term, and advised media representatives not to use this word in conjunction with articles about the cultural and athletic events sponsored by the SFAA. App. 88–92, 94–115.

[29] Before concluding that the incidental regulation of some expressive speech is justified, *ante*, at 541, the Court states that it is not clear that § 110 restricts purely expressive uses of "Olympic," *ante*, at 536. Such vagueness suggests that the Amateur Sports Act dangerously chills even purely expressive speech. In the instant case, a local newspaper organization excised "Olympic" from an edition in response to the imposed injunction. App. 89. See also n. 28, *supra*.

[30] Every commercial use of "Olympic" is regulated under passages of the statute which precede this part of § 110. The USOC is authorized to regulate use of the word as a trademark under § 110(a)(3). All remaining commercial uses of "Olympic" not regulated by that subsection are governed by § 110(a)(4)'s authorization of the USOC to control the use of "Olympic" by "any person . . . for the purpose of trade" or "to induce the sale of any goods or services." Consistent with the Court's interpretation, this authorization gives the USOC the right to Lanham Act remedies, even if the SFAA's use of "Olympic" is noncommercial, nonconfusing, and merely descriptive.

[31] The SFAA's amateur athletic events include competition by age-groups with mixed genders in some sports to promote a climate of competition that emphasizes personal improvement rather than winning, and promotes goodwill toward all ages, sexes, and races. App. 98.

sexual orientation, age, sex, and nationality. App. 93–99. In conjunction with these events, the SFAA distributes literature describing the meaning of the Gay Olympic Games. References to "Olympic" in this literature were deleted in response to the injunction, because of § 110's application to the promotion of athletic and theatrical events. *Id.*, at 88–89, 94, 97.

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Thus, contrary to the belief of the Court, § 110 may prohibit a substantial amount of noncommercial speech, and is therefore unconstitutionally overbroad. *Schaumburg* v. *Citizens for a Better Environment*, *supra*, at 632. This overbreadth is particularly significant in light of the unfettered discretion the Act affords to the USOC to prohibit other entities from using the word "Olympic." Given the large number of such users,[32] this broad discretion creates the potential for significant suppression of protected speech. "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150–151 (1969). See also *Niemtko* v. *Maryland*, 340 U. S. 268, 272 (1951). "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940). This broad discretion, with its potential for abuse, also renders § 110 unconstitutionally overbroad on its face.

B

The Court concedes that "some" uses of "Olympic" prohibited under § 110 may involve expressive speech. *Ante*, at

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[32] See Brief for Respondents 40–41. In Los Angeles and Manhattan alone, there are over 200 enterprises and organizations listed in the telephone directories whose names start with the word "Olympic." 789 F. 2d 1319, 1323 (CA9 1986) (Kozinski, J., dissenting).

535. But it contends that "[b]y prohibiting the use of one word for particular purposes, neither Congress nor the USOC has prohibited the SFAA from conveying its message. . . . Section 110 restricts only the *manner* in which the SFAA may convey its message." *Ante*, at 536 (emphasis added). Section 110(a)(4) cannot be regarded as a mere time, place, and manner statute, however. By preventing the use of the word "Olympic," the statute violates the First Amendment by prohibiting dissemination of a message for which there is no adequate translation.

In *Cohen* v. *California*, 403 U. S. 15 (1971), we rejected the very notion advanced today by the Court when considering the censorship of a single four-letter expletive:

> "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able . . . to discern little social benefit that might result from running the risk of opening the door to such grave results." *Id.*, at 26.

The Amateur Sports Act gives a single entity exclusive control over a wide range of uses of a word with a deep history in the English language and Western culture. Here, the SFAA intended, by use of the word "Olympic," to promote a realistic image of homosexual men and women that would help them move into the mainstream of their communities. As Judge Kozinski observed in dissent in the Court of Appeals, just as a jacket reading "I Strongly Resent the Draft" would not have conveyed Cohen's message, so a title such as "The Best and Most Accomplished Amateur Gay Athletes Competition" would not serve as an adequate translation of petitioners' message. 789 F. 2d 1319, 1321 (CA9 1986). Indeed, because individual words carry "a life and force of their own," translations never fully capture the sense of the original.[33] The First Amendment protects more than the right to a mere translation. By prohibiting use of the word "Olympic," the USOC substantially infringes upon the SFAA's right to communicate ideas.

C

The Amateur Sports Act also violates the First Amendment because it restricts speech in a way that is not content neutral. A wide variety of groups apparently wish to express particular sociopolitical messages through the use of the word "Olympic," but the Amateur Sports Act singles out certain of the groups for favorable treatment. As the Court observes, *ante*, at 542–543, n. 22, Congress encouraged the USOC to allow the use of "Olympic" in athletic competitions held for youth ("Junior Olympics" and "Explorer Olympics") and handicapped persons ("Special Olympics"), 36 U. S. C. § 374(13), while leaving to the USOC's unfettered discretion the question whether other groups may use it. See, *e. g.*, *USOC* v. *Golden Age Olympics, Inc.*, Opposition No. 62,426 (Patents and Trademarks Comm'n, June 4, 1981) (reprinted in App. 383) (denial of use of "Olympic" to senior citizens group); *USOC* v. *International Federation of Body Builders*, 219 USPQ 353 (DC 1982) (denial of use to organization promoting bodybuilding).

The statute thus encourages the USOC to endorse particular noncommercial messages, while prohibiting others. Such a scheme is unacceptable under the First Amendment.[34] "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972). See also *Regan* v. *Time, Inc.*, 468 U. S. 641, 648–649 (1984) (holding that Government determination of publishability of photographs based on whether message is "newsworthy or educational" constitutes content-based discrimination in violation of First Amendment).

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[33] James Boyd White has written:

"When we look at particular words, it is not their translation into statements of equivalence that we should seek but an understanding of the possibilities they represent for making and changing the world. . . . Such words do not operate in ordinary speech as restatable concepts but as words with a life and force of their own. They cannot be replaced with definitions, as though they were parts of a closed system, for they constitute unique resources, of mixed fact and value, and their translation into other terms would destroy their nature. Their meaning resides not in their reducibility to other terms but in their irreducibility. . . . They operate indeed in part as gestures, with a meaning that cannot be restated." J. White, When Words Lose Their Meaning 11 (1984).

D

Even if § 110(a)(4) may fairly be characterized as a statute that directly regulates only commercial speech, its incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial Government interest. The sole Government interest proffered for giving the USOC sweeping powers over the use of "Olympic" is the desire to provide a financial subsidy to the USOC. Brief for Respondents 24. At minimum, it is necessary to consider whether the USOC's interest in use of the word "Olympic" could not adequately be protected by rights coextensive with those in the Lanham Act, or by some other restriction on use of the word.

In the absence of § 110(a)(4), the USOC would have authority under the Lanham Act to enforce its "Olympic" trademark against commercial uses of the word that might cause consumer confusion and a loss of the mark's distinctiveness.[35] There is no evidence in the record that this authority is insufficient to protect the USOC from economic harm. The record and the legislative history are barren of proof or conclusion that noncommercial, nonconfusing, and nontrademark use of "Olympic" in any way dilutes or weakens the USOC's trademark. See *Stop The Olympic Prison* v. *United States Olympic Committee*, 489 F. Supp. 1112, 1123 (SDNY 1980) (dismissing USOC's dilution claim because no actual proof of such injury). No explanation is offered, for instance, as to how the use of "Olympic" in theatrical events in conjunction with a disclaimer "not associated with [the USOC]" harms the economic force of the trademark. See Brief for Petitioners 12. The Court contends that § 110 may prohibit uses of "Olympic" because it protects an "image carefully cultivated by the USOC." *Ante*, at 541. Again, there is no proof in the record that the Lanham Act inadequately protects the USOC's commercial interest in its image or that the SFAA has harmed the USOC's image by its speech.[36]

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[34] Due to the particular meaning of "Olympic," the suppression of the use of the word has its harshest impact on those groups that may benefit most from its use, such as those with debilitating birth defects, see *USOC* v. *March of Dimes Birth Defects Foundation*, No. CA 83–539 (Colo., July 1, 1983), and the aged, see *USOC* v. *Golden Age Olympics, Inc.*, Opposition No. 62,426. Cf. *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 763 (1976).

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[35] In this litigation, the USOC filed causes of action under the Lanham Act, the Amateur Sports Act, and the California dilution statute. App. 7-14.

[36] Nor is there any evidence that SFAA's expressive speech caused economic or reputational harm to the USOC's image. In *Spence* v. *Washington*, 418 U. S. 405 (1974), a State asserted a similar interest in the integrity of America's flag as "'an unalloyed symbol of our country,'" and contended that there is a substantial Government interest in "preserving the flag as 'an important symbol of nationhood and unity.'" *Id.*, at 421. The Court considered whether a State could withdraw "a unique national symbol from the roster of materials that may be used as a background for communications." *Id.*, at 423 (REHNQUIST, J., dissenting). It reviewed a state law that limited the use of the American flag and forbade the public exhibition of a flag that was distorted or marked. *Id.*, at 407, 422. The appellant was convicted for violating the statute by displaying the flag upside down in the window of his apartment with a peace symbol attached to it. Eight Members of the Court held that the statute was unconstitutional as applied to appellant's activity. "There was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his view-

Language, even in a commercial context, properly belongs to the public, unless the Government's asserted interest is substantial, and unless the limitation imposed is no more extensive than necessary to serve that interest. See *ante*, at 537, n. 16; see also *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S., at 215, n. 21 (STEVENS, J., dissenting), citing *Otto Roth & Co.* v. *Universal Foods Corp.*, 640 F. 2d 1317, 1320 (CCPA 1981) (recognizing importance of "free use of the language" in commercial speech context).[37] The Lanham Act is carefully crafted to prevent commercial monopolization of language that otherwise belongs in the public domain. See *Park 'N Fly, Inc.*, *supra*, at 200–201.[38] The USOC demonstrates no need for additional protection. In my view, the SFAA therefore is entitled to use the word "Olympic" in a nonconfusing and nonmisleading manner in the noncommercial promotion of a theatrical or athletic event, absent proof of resultant harm to the USOC.

I dissent.

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point," and "his message was direct, likely to be understood, and within the contours of the First Amendment." *Id.*, at 414–415. The Court concluded that since the state interest was not "significantly impaired," the conviction violated the First Amendment. *Id.*, at 415. Similarly, in this case, the SFAA's primary purpose was to convey a political message that is nonmisleading and direct. This message, like the symbolic speech in *Spence*, is protected by the First Amendment.

[37] See also *Bada Co.* v. *Montgomery Ward & Co.*, 426 F. 2d 8, 11 (CA9) ("[O]ne competitor will not be permitted to impoverish the language of commerce by preventing his fellows from fairly describing their own goods"), cert. denied, 400 U. S. 916 (1970).

[38] The Lanham Act "provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers." *Park 'N Fly, Inc.*, 469 U. S., at 198.

RIVERA *v.* MINNICH

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 86-98. Argued March 25, 1987—Decided June 25, 1987

Appellee, an unmarried mother, filed a child-support suit in a Pennsylvania court against appellant, alleging that he was the child's father. The judge denied appellant's pretrial motion seeking a ruling that the Due Process Clause of the Fourteenth Amendment was violated by a state statute providing that the burden of proving paternity "shall be by a preponderance of the evidence," and requesting a jury instruction that paternity must be established by clear and convincing evidence. Applying the preponderance standard, the jury found that appellant was the father, but the judge later reconsidered his ruling on the burden of proof issue and granted appellant's motion for a new trial. The Pennsylvania Supreme Court held that the statute was constitutional and reinstated the jury's verdict.

Held: Pennsylvania's preponderance standard for determining paternity is constitutionally permissible. The preponderance standard is applied most frequently in litigation between private parties in every State and, more specifically, is the standard that is applied in paternity litigation in the majority of American jurisdictions that regard such proceedings as civil in nature (as does Pennsylvania). Such a legislative judgment is entitled to a powerful presumption of validity when challenged under the Due Process Clause. This case is not controlled by the holding in *Santosky* v. *Kramer*, 455 U. S. 745, that the Constitution requires clear and convincing evidence before a State may terminate the parental relationship. Appellant's contention to the contrary rests on the erroneous tacit assumption of an equivalence between the State's imposition of the legal obligations accompanying a biological relationship between parent and child and the State's termination of a fully existing parent-child relationship. The collective judgment of the many state legislatures that adhere to a preponderance standard for paternity proceedings rests on legitimate and significant distinctions between termination and paternity proceedings. Pp. 577–582.

509 Pa. 588, 506 A. 2d 879, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and SCALIA, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 582. BRENNAN, J., filed a dissenting opinion, *post*, p. 583.

William Watt Campbell argued the cause for appellant. With him on the brief was *James R. Adams*.

Mary Louise Barton argued the cause and filed a brief for appellee.*

JUSTICE STEVENS delivered the opinion of the Court.

The Pennsylvania statute governing proceedings brought against a defendant to establish his paternity of a child born out of wedlock specifies that the "burden of proof shall be by a preponderance of the evidence."[1] This appeal presents the question whether a determination of paternity by that evidentiary standard complies with the Due Process Clause of the Fourteenth Amendment. We agree with the Supreme Court of Pennsylvania's conclusion that applying the preponderance standard to this determination is constitutionally permissible.

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*Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, *Jay Bloom*, Supervising Deputy Attorney General, *M. Howard Wayne*, Deputy Attorney General, *John S. Higgins, Jr.*, *Joseph I. Lieberman*, Attorney General of Connecticut, *Jim Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Frank J. Kelley*, Attorney General of Michigan, *Brian McKay*, Attorney General of Nevada, *Roger A. Tellinghuisen*, Attorney General of South Dakota, and *W. J. Michael Cody*, Attorney General of Tennessee; and for the State of Oregon by *Dave Frohnmayer*, Attorney General, *William F. Gary*, Deputy Attorney General, *Virginia L. Linder*, Solicitor General, *Michael D. Reynolds*, Assistant Solicitor General, and *Robert M. Atkinson*, Assistant Attorney General.

[1] Pennsylvania Stat. Ann., Tit. 42, § 6704(g) (Purdon 1982):

"*Trial of Paternity*—Where the paternity of a child born out of wedlock is disputed, the determination of paternity shall be made by the court without a jury unless either party demands trial by jury. The trial, whether or not a trial by jury is demanded, shall be a civil trial and there shall be no right to a criminal trial on the issue of paternity. *The burden of proof shall be by a preponderance of the evidence.*" (Emphasis supplied.)

The statute was repealed on October 30, 1985; its successor also provides that the burden of proof in a paternity action "shall be by a preponderance of the evidence." 23 Pa. Cons. Stat. § 4343(a) (1985).

I

On May 28, 1983, appellee Jean Marie Minnich, an unmarried woman, gave birth to Cory Michael Minnich. Three weeks later, appellee filed a complaint for child support in the Common Pleas Court of Lancaster County, Pennsylvania, against appellant Gregory Rivera, alleging that he was the father of her son. In advance of trial appellant requested the court to rule that the statutory burden of proof of paternity violated the Due Process Clause of the Fourteenth Amendment and to instruct the jury that paternity must be established by clear and convincing evidence. The trial judge denied the motion. Applying the preponderance standard, the jury unanimously found that appellant is the father of the child. On appellant's post-trial motions, the trial judge reconsidered his ruling on the burden of proof issue and granted appellant's motion for a new trial. Appellee appealed directly to the Pennsylvania Supreme Court, which held that the statute is constitutional and reinstated the jury's verdict. 509 Pa. 588, 506 A. 2d 879 (1986).

The State Supreme Court noted that the standard was entitled to the presumption that legislative enactments are valid, and is the same as that approved by a majority of the jurisdictions that regard paternity suits as civil proceedings. Then, after reviewing the respective interests of the putative father, the mother, and the child,[2] as well as "the interest of

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[2] "The person alleged to be father has a legitimate interest in not being declared the father of a child he had no hand in bringing into the world. It is important to him that he not be required to provide support and direct financial assistance to one not his child. There is a legitimate concern on his part with not having a stranger declared his legal heir thereby giving that stranger potential interests, inter alia, in his estate, and Social Security Benefits. He has an interest in not being responsible for the health, welfare and education of a child not his own.

"The child born out of wedlock, on the other hand, has an interest in knowing his father and in having two parents to provide and care for him. The child's concerns include a known belonging to a certain line of descent the Commonwealth in seeing that fathers support their children who are born out of wedlock so that those children do not become public charges," the court concluded that the preponderance standard is one that "does not unduly risk the erroneous deprivation of any of them."[3] The Chief Justice of that court dissented. Relying on our holding in *Santosky* v. *Kramer*, 455 U. S. 745 (1982), that the Constitution requires clear and convincing evidence before the State may terminate the parental relationship, he reasoned that the same degree of proof should be required to create the relationship.[4] We noted probable jurisdiction, 479 U. S. 960 (1986), and now affirm.

II

The preponderance of the evidence standard that the Pennsylvania Legislature has prescribed for paternity cases is the standard that is applied most frequently in litigation between private parties in every State.[5] More specifically, it is the

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with knowledge of any benefits or detriments inheritable from that line. Further, the child is entitled to financial assistance from each parent able to provide such support.

"The mother has an interest in receiving from the child's natural father help, financial and otherwise, in raising and caring for the child born out of wedlock. She has an interest in seeing that her child has two responsible parents." 509 Pa., at 593–594, 506 A. 2d, at 882.

[3] *Id.*, at 596–597, 506 A. 2d, at 883. Earlier the court had described the public interest more fully:

"The Commonwealth has an interest in its infant citizens having two parents to provide and care for them. There is a legitimate interest in not furnishing financial assistance for children who have a father capable of support. The Commonwealth is concerned in having a father responsible for a child born out of wedlock. This not only tends to reduce the welfare burden by keeping minor children, who have a financially able parent, off the rolls, but it also provides an identifiable father from whom potential recovery may be had of welfare payments which are paid to support the child born out of wedlock." *Id.*, at 594, 506 A. 2d, at 882.

[4] See *id.*, at 600, 506 A. 2d, at 885.

[5] "[T]he typical civil case involv[es] a monetary dispute between private parties. Since society has a minimal concern with the outcome of such pri-

same standard that is applied in paternity litigation in the majority of American jurisdictions that regard such proceedings as civil in nature.[6] A legislative judgment that is not only consistent with the "dominant opinion" throughout the country but is also in accord with "the traditions of our people and our law," see *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting), is entitled to a powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment.

The converse of this proposition is that a principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions. In each of the three cases in which we have held that a standard of proof prescribed by a state legislature was unconstitutional, our judgment was consistent with the standard imposed by most jurisdictions. Thus, in explaining our conclusion that proof of a criminal charge beyond a reasonable doubt is constitutionally required, we stated:

> "Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judg-

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vate suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion." *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). See also E. Cleary, McCormick on Evidence 956 (3d ed. 1984) (preponderance standard applies to "the general run of issues in civil cases").

[6] See 10 Am. Jur. 2d, Bastards 837, 922 (1983); National Conference of State Legislatures, In the Best Interest of the Child: A Guide to State Child Support and Paternity Laws 102–103 (1982). A few States apply a more stringent standard of proof to a civil paternity action. See, *e. g.*, *In re Wayne County Dept. of Social Services* v. *Williams*, 63 N. Y. 2d 658, 660, 468 N. E. 2d 705 (1984); *E. E.* v. *F. F.*, 106 App. Div. 2d 694, 483 N. Y. S. 2d 748 (1984) (clear and convincing evidence); Va. Code § 20–61.1 (Supp. 1986); *Jones* v. *Robinson*, 229 Va. 276, 287, 329 S. E. 2d 794, 800 (1985) (proof beyond a reasonable doubt).

> ment about the way in which law should be enforced and justice administered.' *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968)." *In re Winship*, 397 U. S. 358, 361–362 (1970).

Similarly, in *Addington* v. *Texas*, 441 U. S. 418 (1979), our rejection of Texas' argument that a preponderance standard of proof was sufficient in a civil proceeding to commit an individual to a state mental hospital involuntarily was supported by the fact that a majority of the States had chosen to apply either a clear and convincing standard, *id.*, at 431–432, nn. 6, 7, and 8, or the even more demanding criminal law standard, *id.*, at 430–431, and n. 5. And in *Santosky* v. *Kramer*, which presented the question whether New York could extinguish a pre-existing parent-child relationship without requiring greater factual certainty than a fair preponderance of the evidence, we began our analysis by noting that 38 jurisdictions required a higher standard of proof in proceedings to terminate parental rights. 455 U. S., at 749–750.

Appellant's principal argument is that the standard of proof required by our holding in *Santosky* to terminate the parent-child relationship is also constitutionally required to create it. This view of *Santosky* rests on the tacit assumption of an equivalence between the State's imposition of the legal obligations accompanying a biological relationship between parent and child and the State's termination of a fully existing parent-child relationship. We are unable to accept this assumption. The collective judgment of the many state legislatures which adhere to a preponderance standard for paternity proceedings rests on legitimate and significant distinctions between termination and paternity proceedings.

First, there is an important difference between the ultimate results of a judgment in the two proceedings. Resolving the question whether there is a causal connection between an alleged physical act of a putative father and the subsequent birth of the plaintiff's child sufficient to impose financial liability on the father will not trammel any pre-existing rights; the putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law. In the typical contested paternity proceeding, the defendant's nonadmission of paternity represents a disavowal of any interest in providing the training, nurture, and loving protection that are at the heart of the parental relationship protected by the Constitution. See *Lehr* v. *Robertson*, 463 U. S. 248, 261 (1983).[7] Rather, the primary interest of the defendant is in avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child. In contrast, in a termination proceeding the State is seeking to destroy permanently all legal recognition of the parental relationship. In *Santosky*, we described the parent's desire for, and right to, the companionship, care, and custody of his or her children as "an interest far more precious than any property right." 455 U. S., at 758–759. The State's determination that the relationship between a parent and his or her child ought to be stripped of legal recognition abrogates many aspects of this precious interest. The difference between the two types of proceedings is thus a difference that is directly related to the degree of proof that is appropriately required. For, as we have said in explanation of the need for clear and convincing evidence in certain proceedings, "rights once confirmed should not be lightly revoked." *Schneiderman* v. *United States*, 320 U. S. 118, 125 (1943).

Second, there is an important distinction between the parties' relationship to each other in the two proceedings. As is true of the other types of proceedings in which the Court has concluded that the Constitution demands a higher standard of proof than a mere preponderance of the evidence, the contestants in a termination proceeding are the State and an individual. Because the State has superior resources, see *Santosky*, 455 U. S., at 763, and because an adverse ruling in a criminal, civil commitment, or termination proceeding has especially severe consequences for the individuals affected, it is appropriate for society to impose upon itself a disproportionate share of the risk of error in such proceedings. See *In re Winship*, 397 U. S., at 370–372 (Harlan, J., concurring); *Addington*, 441 U. S., at 427; *Santosky*, 455 U. S., at 766. Unlike those proceedings, in a paternity suit the principal adversaries are the mother and the putative father, each of whom has an extremely important, but nevertheless relatively equal, interest in the outcome. Each would suffer in a similar way the consequences of an adverse ruling; thus, it is appropriate that each share roughly equally the risk of an inaccurate factual determination. Nor does the child's interest in the proceeding favor placing a disproportionate share of the risk of error on either party. Surely, from the child's point of view, a lower standard of proof increases the possibility of an erroneous determination that the defendant is his or her father, while a higher standard of proof increases the risk of a mistaken finding that the defendant is not his or her true father and thus may not be required to assume responsibility for his or her support. The equipoise of the private interests that are at stake in a paternity proceeding supports the conclusion that the standard of proof normally applied in private litigation is also appropriate for these cases.[8]

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[7] "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' *Caban* [v. *Mohammed*, 441 U. S. 380, 392 (1979)], his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as a father toward his children.' *Id.*, at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds." 463 U. S., at 261.

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[8] Unlike the State Supreme Court, we place no reliance on the State's interest in avoiding financial responsibility for children born out of wedlock. If it were relevant, the State's financial interest in the outcome of the case would weigh in favor of imposing a disproportionate share of the risk of error upon it by requiring a higher standard of proof. In our view,

Finally, there is an important difference in the finality of judgment in favor of the defendant in a termination proceeding and in a paternity proceeding. As we pointed out in *Santosky*, "natural parents have no 'double jeopardy' defense" against the State's repeated efforts to terminate parental rights. 455 U. S., at 764. If the State initially fails to win termination, as New York did in that case, see *id.*, at 751, n. 4, it always can try once again as family circumstances change or as it gathers more or better evidence. "[E]ven when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts." *Id.*, at 764. The imposition of a higher standard of proof protects the parents, and to some degree the child, from renewed efforts to sever their familial ties. In contrast, a paternity suit terminates with the entry of a final judgment that bars repeated litigation of the same issue under normal principles of civil litigation. There is no "striking asymmetry in [the parties'] litigation options." *Ibid.*

The judgment of the Supreme Court of Pennsylvania is therefore

Affirmed.

JUSTICE O'CONNOR, concurring in the judgment.

I believe that the judgment of the Pennsylvania Supreme Court should be affirmed for the reasons set forth by JUSTICE REHNQUIST in dissent in *Santosky* v. *Kramer*, 455 U. S. 745, 770–791 (1982). "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements." *United States* v. *Yazell*, 382 U. S. 341, 352 (1966). Particu-

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however, the State's legitimate interest is in the fair and impartial adjudication of all civil disputes, including paternity proceedings. This interest is served by the State's independent judiciary, which presumably resolves these disputes unaffected by the State's interest in minimizing its welfare expenditures.

larly in light of that special solicitude, I cannot find that the flexible concept of due process, *Santosky* v. *Kramer*, *supra*, at 774–776 (REHNQUIST, J., dissenting), bars Pennsylvania from providing that the litigants to a civil paternity suit are to bear the risk of factual error in roughly equal fashion. I do not find it necessary to this conclusion to rely upon the fact that the majority of American jurisdictions apply the same rule as Pennsylvania does. Cf. *ante*, at 577–578. Nor do I agree that the differences between termination and paternity proceedings are substantial enough to justify the different conclusion reached in *Santosky*. Accordingly, I concur in the Court's judgment but not its opinion.

JUSTICE BRENNAN, dissenting.

I cannot agree with the Court that a determination of paternity is no more significant than the resolution of "'a monetary dispute between private parties.'" *Ante*, at 577–578, n. 5, quoting *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). What is at stake for a defendant in such a proceeding is not merely the prospect of a discrete payment in satisfaction of a limited obligation. Rather, it is the imposition of a lifelong relationship with significant financial, legal, and moral dimensions.

Financially, a paternity determination results in ongoing, open-ended support responsibility. A parent is responsible for supporting a child at least until the child is 18, see, *e. g.*, 23 Pa. Cons. Stat. § 4321(2) (1985), and perhaps longer. § 4321(3). The father cannot be certain of the amount of support that will be necessary, for this will depend on the needs of the particular child over the years. § 4322. See also Uniform Marriage and Divorce Act, 9A U. L. A. § 309 (1979 and Supp. 1987). If his child receives any form of public assistance, all the father's real and personal property are deemed available to the State for reimbursement. Pa. Stat. Ann., Tit. 62, § 1974 (1968 and Supp. 1987). The financial commitment imposed upon a losing defendant in a paternity suit is thus far more onerous and unpredictable than the liability borne by the loser in a typical civil suit.

The obligation created by a determination of paternity is enforced by significant legal sanctions. Failure to comply with a support obligation may result in the attachment of income, 23 Pa. Cons. Stat. § 4348 (1985), and a 10% penalty may be imposed for any amount in arrears for more than 30 days if the failure to pay is deemed willful. § 4348(c). In addition, a father's state and federal income tax refunds may be confiscated to pay alleged arrearages. 42 U. S. C. § 664 (1982 ed., Supp. III); 23 Pa. Cons. Stat. § 4307 (1985). Furthermore, failure to satisfy the support obligation may result in incarceration. A delinquent father may be declared in contempt of court and imprisoned for up to six months, § 4345, and may also be found guilty of a misdemeanor punishable by imprisonment for up to two years. 18 Pa. Cons. Stat. §§ 4304, 1104 (1982). A paternity determination therefore establishes a legal duty whose assumption exposes the father to the potential loss of both property and liberty.

"Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship." *Little* v. *Streater*, 452 U. S. 1, 13 (1981). The judgment that a defendant is the father of a particular child is the pronouncement of more than mere financial responsibility. It is also a declaration that a defendant assumes a cultural role with distinct moral expectations. Most of us see parenthood as a lifelong status whose responsibilities flow from a wellspring far more profound than legal decree. Some men may find no emotional resonance in fatherhood. Many, however, will come to see themselves far differently, and will necessarily expand the boundaries of their moral sensibility to encompass the child that has been found to be their own. The establishment of a parental relationship may at the outset have fewer emotional consequences than the termination of one. It has, however, the potential to set in motion a process of engagement that is powerful and cumulative, and whose duration spans a lifetime. In this respect, a paternity determination is far more akin to the proceeding involved in *Santosky* v. *Kramer*, 455 U. S. 745 (1982), than to a suit for breach of contract.[1]

Finally, the losing defendant in a paternity suit is subject to characterization by others as a father who sought to shirk responsibility for his actions. See, *e. g.*, *County of Hennepin* v. *Brinkman*, 378 N. W. 2d 790, 794, (Minn. 1985) ("'[T]he social stigma resulting from an adjudication of paternity cannot be ignored'") (citation omitted); *Tennessee Dept. of Human Services* v. *Vaughn*, 595 S. W. 2d 62, 67 (Tenn. 1980) (losing defendant in paternity proceeding "branded as the bearer of a bastard child"); *Commonwealth* v. *Jacobs*, 220 Pa. Super. 31, 37. 279 A. 2d 251, 254 (1971) ("Inevitably, paternity proceedings, whether labeled civil or criminal, result in a certain community stigma following a judicial acknowledgment of the parents' impropriety"). He is seen as a parent apparently impervious to the moral demands of that role, who must instead be coerced by law to fulfill his obligation. Regardless of whether a satisfying parent-child relationship ultimately develops, the father will be seen as a person whose initial participation in it was involuntary. By contrast, the losing party in a civil suit is rarely the target of such social opprobrium.[2]

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[1] Its consequences are also at least as serious as those resulting from other proceedings in which Pennsylvania demands proof by clear and convincing evidence, such as proof of a change of domicile, *McKenna* v. *McKenna*, 282 Pa. Super. 45, 422 A. 2d 668 (1980); reformation of contract on grounds of mistake, *Boyertown National Bank* v. *Hartman*, 147 Pa. 558, 23 A. 842 (1892); proof of adverse possession, *Stevenson* v. *Stein*, 412 Pa. 478, 195 A. 2d 268 (1963); and a claim for wages for personal services rendered to a decedent, *Mooney's Estate*, 328 Pa. 273, 194 A. 893 (1937).

[2] Of course, a child also has an interest in not being stigmatized as illegitimate. As we have stressed, however, an illegitimate child cannot be held responsible for his or her status. See *Trimble* v. *Gordon*, 430 U. S.

A paternity proceeding thus implicates significant property and liberty interests of the defendant. These can be protected without significantly burdening the interests of the mother, the child, or the State. Modern blood-grouping tests, such as the human leukocyte antigen (HLA) test used in this case, provide an extremely reliable means of determining paternity in most cases. See generally L. Sussman, Paternity Testing By Blood Grouping (2d ed. 1976). The probability of paternity in this case, for instance, was calculated at 94.6%, Brief for Appellee 2, a level of certainty achieved quite frequently through the use of such tests. See, *e. g.*, *Jones* v. *Robinson*, 229 Va. 276, 282, 329 S. E. 2d 794, 798 (1985) (probability of paternity calculated at 99.97% and "at least" 99% in two consolidated appeals).

It is likely that the requirement that paternity be proved by clear and convincing evidence would make a practical difference only in cases in which blood test results were not introduced as evidence. In such cases, what I wrote over 35 years ago is still true: "in the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity." *Cortese* v. *Cortese*, 10 N. J. Super. 152, 156, 76 A. 2d 717, 719 (1950). Recognition of this fact, as well as of the gravity of imposing a parental relationship upon a defendant, should lead us to require a more demanding standard of proof than a mere preponderance of the evidence.

I respectfully dissent.

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762 (1977). By contrast, the stigma that attaches to the father of such a child reflects a judgment regarding moral culpability. In addition, as I discuss in text this page, I believe that the child's interest in legitimation would not be significantly burdened by the employment of a "clear and convincing" standard.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* GILLIARD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

No. 86-509. Argued April 22, 1987—Decided June 25, 1987*

In 1975, federal statutes governing the Aid to Families with Dependent Children (AFDC) program required, as a condition of eligibility, that applicants for assistance assign to the State any right to receive child support payments for any family member included in the family unit, but a recipient of aid (the amount of which is determined by the number and income of persons in the family unit) could exclude a child for whom support payments were being made from the family unit if it was financially advantageous to do so, even though the child continued to live with the family. The Deficit Reduction Act of 1984 (DEFRA) amended the AFDC program to require families to include in the filing unit all children living in the same home, including those for whom support payments were being received. Under a separate amendment, the first $50 per month of child support collected by the State must be remitted to the family and not counted as income in determining its benefit level. Thus, if the assigned support exceeded $50 plus the difference in the benefit level resulting from adding the child to the family unit, the family would suffer financially as compared with its total income prior to the amendment. In a class action, the Federal District Court held that North Carolina's implementing regulations were in conformance with the statute, but that the 1984 statutory scheme violated the Due Process Clause of the Fifth Amendment and its equal protection component, as well as the Takings Clause of that Amendment.

Held:

1. The statutory scheme does not violate Fifth Amendment due process and equal protection principles. The DEFRA amendment rationally serves both Congress' goal of decreasing federal expenditures, and the Government's separate interest in distributing benefits among competing needy families in a fair way. It was also rational for Congress to adjust the AFDC program to reflect the fact that support money generally provides significant benefits for entire family units. There is no

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*Together with No. 86-564, *Flaherty, Secretary, North Carolina Department of Human Resources, et al.* v. *Gilliard et al.*, also on appeal from the same court.

merit to the view that some form of "heightened scrutiny" must be applied because the amendment interferes with a family's fundamental right to live in the type of family unit it chooses by intruding on choices concerning family living arrangements. The appropriate standard of review here is whether Congress had a "rational basis" for its decision. Cf. *Lyng* v. *Castillo*, 477 U. S. 635. Pp. 598–603.

2. The DEFRA amendment does not violate the Fifth Amendment's Takings Clause. The family members other than the supported child have no claim, since they have no protected property rights to continued AFDC benefits at the same level as before the amendment. Nor does the simple inclusion of the support income in the benefit calculation have any legal effect on the supported child's right to have it used for his or her benefit. The argument that the requirement that an AFDC applicant must assign the support payments to the State, which then, in effect, remits the amount collected to the custodial parent as part of the AFDC payment to be used for the benefit of the entire family, modifies the child's interest in the use of the money so dramatically that it constitutes a taking of the child's property is refuted by three pertinent factors. First, there is no such substantial "economic impact" on the child's right to have support funds used for his or her exclusive benefit as to constitute a "taking." Second, the child holds no vested protectable expectation that the parent will continue to receive identical support payments on the child's behalf, and that the child will enjoy the same rights with respect to them. Third, the character of the governmental action militates against a finding that the State or Federal Governments unconstitutionally take property through the AFDC program. Pp. 603–609.

633 F. Supp. 1529, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 609. BLACKMUN, J., filed a dissenting opinion, *post*, p. 634.

Deputy Solicitor General Lauber argued the cause for appellant in No. 86–509. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Jerrold J. Ganzfried*, and *William Kanter*. *Catherine C. McLamb*, Assistant Attorney General of North Carolina, argued the cause for appellants in No. 86–564. With her on the briefs were *Lacy H. Thornburg*, Attorney General, and *Lemuel W. Hinton*, Assistant Attorney General.

Jane R. Wettach argued the cause for appellees in both cases. With her on the brief were *Lucie E. White*, *Julius LeVonne Chambers*, *Eric Schnapper*, and *Jean M. Cary*.†

JUSTICE STEVENS delivered the opinion of the Court.

As part of its major effort to reduce the federal deficit through the Deficit Reduction Act of 1984, 98 Stat. 494, Congress amended the statute authorizing Federal Aid to Families with Dependent Children (AFDC)[1] to require that a family's eligibility for benefits must take into account, with certain specified exceptions, the income of all parents, brothers, and sisters living in the same home.[2] The principal

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†Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Joan E. Bertin*; for Juvenile and Family Court Judges by *Thomas J. Madden*; and for the NOW Legal Defense and Education Fund et al. by *Sally F. Goldfarb*, *Sarah E. Burns*, and *Marsha Levick*.

[1] "'The AFDC program is based on a scheme of cooperative federalism.' *King* v. *Smith*, 392 U. S. 309, 316 (1968). Established by Title IV of the Social Security Act of 1935, 49 Stat. 627, 'to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them,' *Shea* v. *Vialpando*, 416 U. S. 251, 253 (1974), the federal program reimburses each State which chooses to participate with a percentage of the funds it expends. § 403, 42 U. S. C. § 603. In return, the State must administer its assistance program pursuant to a state plan that conforms to applicable federal statutes and regulations. § 402, 42 U. S. C. § 602." *Heckler* v. *Turner*, 470 U. S. 184, 189 (1985).

[2] The Deficit Reduction Act of 1984, 98 Stat. 494, which fills over 700 pages of the Statutes at Large, includes two major divisions, the Tax Reform Act of 1984 and the Spending Reduction Act of 1984. The amendment at issue in this case is found in the latter division, 98 Stat. 1145. As a result of that amendment, § 402(a)(38) of the Social Security Act, 42 U. S. C. § 602(a)(38) (1982 ed., Supp. III) now provides, in pertinent part:

"A State plan for aid and services to needy families with children must—

. . . . .

"(38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—

"(A) any parent of such child, and

"(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, question presented in this litigation is whether that requirement violates the Fifth Amendment to the United States Constitution when it is applied to require a family wishing to receive AFDC benefits to include within its unit a child for whom child support payments are being made by a noncustodial parent.

I

This litigation began in 1970. At that time the federal statute did not require that all parents and siblings be included in an AFDC filing unit. Thus, for example, if a teenage child had significant income of her own, perhaps from wages or perhaps in support payments from an absent parent, the other members of her family could exclude her from the filing unit in order to avoid disqualifying the entire family from benefits or reducing its level of benefits.

Beaty Mae Gilliard, one of the named class members in the 1970 suit,[3] began receiving public assistance from North Car-

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if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter) . . . ."

Section 406(a), in turn, provides:

"The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home . . . or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training), if before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school (or such training)." 42 U. S. C. § 606(a).

[3] The class was comprised of "persons who have been or may be subject to reduction of AFDC . . . benefits based upon unconstitutional or illegal claim of credit by administering agencies for outside income and other re-

olina under AFDC in 1962. In February 1970, after her seventh child was born, the State automatically included him in the filing unit, thereby increasing the family's monthly allotment from $217 to $227 to reflect the difference between the benefit for a family of seven and the benefit for a family of eight. Gilliard was, however, also receiving $43.33 each month in child support from the baby's father. When a formal parental support order was entered in April 1970, the State credited the support payments against her account and reduced her monthly benefit to $184. Gilliard sued, contending that she had a statutory right to exclude her seventh child from the unit and thus to continue to receive the $217 benefit for a family of seven and also to retain the $43.33 paid by her youngest child's father. A three-judge District Court agreed with her reading of the statute and entered an order requiring the State to reinstate her benefits at the $217 level and to reimburse her for the improper credits of $43 per month. *Gilliard* v. *Craig*, 331 F. Supp. 587 (WDNC 1971). The District Court also granted classwide relief. We affirmed that judgment. 409 U. S. 807 (1972). No constitutional question was decided at that time.

Congress amended the AFDC program in 1975 to require, as a condition of eligibility, that applicants for assistance must assign to the State any right to receive child support payments for any member of the family included in the filing unit.[4] In response, North Carolina amended its laws to pro-

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sources available to some but not all of a family group." *Gilliard* v. *Craig*, 331 F. Supp. 587, 588 (WDNC 1971).

[4] Section 402(a)(26)(A) provides:

"[A]s a condition of eligibility for aid, each applicant or recipient will be required—

"(A) to assign to the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed . . . ." 42 U. S. C. § 602(a)(26)(A) (1982 ed., Supp. III).

The 1975 amendment also amended § 402 to require recipients to

"cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining vide that the acceptance of public assistance on behalf of a dependent child would constitute an assignment of any right to support for that child. See N. C. Gen. Stat. § 110-137 (Supp. 1985). These amendments, however, did not harm recipients like Gilliard because they did not affect the right to define the family unit covered by an application and thereby to exclude children with independent income, such as a child for whom support payments were being made.

In 1983, the Secretary of Health and Human Services proposed certain amendments to the Social Security Act to "assure that limited Federal and State resources are spent as effectively as possible." Letter of 25 May 1983, to the Honorable George Bush, President of the Senate, App. 168-169 (hereinafter Heckler Letter). One of the Secretary's proposals was "to establish uniform rules on the family members who must file together for AFDC, and the situations in which income must be counted. In general, the parents, sisters, and brothers living together with a dependent child must all be included; the option of excluding a sibling with income, for example, would no longer be available." *Ibid.* The Secretary stressed that the improvements would result in an AFDC allocation program that "much more realistically reflects the actual home situation." *Id.*, at 169.

The Secretary's proposal was not enacted in 1983, but one of the provisions in the Deficit Reduction Act of 1984 (DEFRA) established a standard filing unit for the AFDC program. The Senate Finance Committee estimated that the change would save $455 million during the next three fiscal years. S. Print No. 98-169, p. 980 (1984) (hereinafter Senate Print). It explained the purpose of the amendment

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support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other other payments or property due such applicant or such child . . . ." 42 U. S. C. § 602(a)(26)(B) (1982 ed., Supp. III).

in language that removes any possible ambiguity in the relevant text of the statute:[5]

> "Present Law
>
> "There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit. For example, a family might choose to exclude a child who is receiving social security or child support payments, if the payments would reduce the family's benefits by an amount greater than the amount payable on behalf of the child. . . .
>
> "Explanation of Provision
>
> "The provision approved by the Committee would require States to include in the filing unit the parents and all dependent minor siblings (except SSI recipients and any stepbrothers and stepsisters) living with a child who applies for or receives AFDC. . . .
>
> "This change will end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of family members who live together and share expenses is

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[5] In support of the District Court's judgment, appellees have asked us to adopt a construction of the statute that is completely inconsistent with the intent of Congress as explained in the Secretary's request for the legislation, in the Senate Print, and in the Conference Report as well. Moreover, the arguments are inconsistent with the unambiguous regulations the Secretary has adopted to implement the statute. See 45 CFR §206.10(a)(1)(vii) (1986). The District Court carefully considered these statutory arguments and rejected them. *Gilliard* v. *Kirk*, 633 F. Supp. 1529, 1548 (WDNC 1986). We agree with that court's analysis of the meaning of the statute and find no merit in appellees' statutory arguments advanced in this Court. See also *Gorrie* v. *Bowen*, 809 F. 2d 508, 513–516 (CA8 1987).

> recognized and counted as available to the family as a whole." *Ibid.*

See also H. R. Conf. Rep. No. 98-861, p. 1407 (1984).

Because the 1984 amendment forced families to include in the filing unit children for whom support payments were being received, the practical effect was that many families' total income was reduced.[6] The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefit level.[7] See 42 U. S. C. §§ 602(a)(8)(A)(vi), 657(b)(1) (1982 ed., Supp. III). Thus, the net effect of the 1984 amendments for a family comparable to Gilliard's would include three changes: (1) the addition of the child receiving support would enlarge the filing unit and entitle the family to a somewhat larger benefit; (2) child support would be treated as family income and would be assigned to the State, thereby reducing the AFDC benefits by that amount; and (3) the reduction would be offset by $50 if that amount was collected from an absent parent. In sum, if the assigned support exceeded $50 plus the difference in the benefit level caused by adding the child or children receiving support, the family would suffer; if less than $50 and the difference in the benefit level was collected as support, it would not.

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[6] For example, under the July 1985 levels of payment in North Carolina, a family of four with no other income would have received $269. A child's support income of $100 would therefore reduce the family's AFDC payment to $169 if that child was included in the filing unit. The family would have a net income of $269. But if the family were permitted to exclude the child from the unit and only claim the somewhat smaller benefit of $246 for a family of three, it could have collected that amount plus the excepted child's $100 and have a net income of $346. See App. 85.

[7] Therefore, under our example, n. 6, *supra*, the net income with the child included in the unit would have been $319.

II

After North Carolina adopted regulations to comply with the 1984 amendments, some members of the class that had earlier obtained relief filed a motion to reopen the 1971 decree and obtain further relief on behalf of the class. The State impleaded the Secretary of Health and Human Services, contending that if the State's compliance with the federal statute resulted in any liability to appellees, the Federal Government should share in any payment of additional AFDC benefits. The District Court found that North Carolina's and the Department of Health and Human Services' regulations were in conformance with the statute,[8] but concluded that the statutory scheme violated both the Due Process Clause and the Takings Clause of the Fifth Amendment.[9]

The court interpreted North Carolina law as imposing a duty on the custodial parent to use child support money exclusively for the benefit of the child for whom it had been obtained,[10] and reasoned that a forced assignment of the support

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[8] The Secretary of Health and Human Services promulgated the following regulation to implement the DEFRA amendments:

"For AFDC purposes only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:

"(A) Any natural or adoptive parent, or stepparent (in the case of States with laws of general applicability); and

"(B) Any blood-related or adoptive brother or sister." 45 CFR § 206.10 (a)(1)(vii) (1986).

North Carolina's implementing regulations are set forth in the District Court's opinion. 633 F. Supp., at 1533–1534.

[9] "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5.

[10] The District Court relied on the following paragraph of the opinion of the North Carolina Supreme Court in *Goodyear* v. *Goodyear*, 257 N. C. 374, 379, 126 S. E. 2d 113, 117 (1962):

"While defendant [father] was and is obligated to make the monthly payments called for in his contract for the support of his children, plaintiff [mother] is not the beneficiary of the moneys which defendant must money to the State in exchange for AFDC benefits for the entire family was a taking of the child's private property. *Gilliard* v. *Kirk*, 633 F. Supp. 1529, 1551–1555 (WDNC 1986). Additionally, the court reasoned that the use of the child's support money to reduce the Government's AFDC expenditures was tantamount to punishing the child for exercising the fundamental right to live with his or her family. *Id.*, at 1557. Because of the serious impact on the autonomy of the family—including the child's potential relationship with his or her noncustodial parent—"special judicial scrutiny" was considered appropriate, *id.*, at 1555–1557, and the deprivation of property and liberty effected by the statutory scheme could not, in the court's view, survive such scrutiny. We noted probable jurisdiction, 479 U. S. 1004 (1986).

The District Court was undoubtedly correct in its perception that a number of needy families have suffered, and will suffer, as a result of the implementation of the DEFRA amendments to the AFDC program. Such suffering is frequently the tragic byproduct of a decision to reduce or to modify benefits to a class of needy recipients. Under our structure of government, however, it is the function of Congress—not the courts—to determine whether the savings realized, and presumably used for other critical governmental functions, are significant enough to justify the costs to the individuals affected by such reductions. The Fifth Amendment "gives the federal courts no power to impose upon [Congress] their views of what constitutes wise economic or social policy," by telling it how "to reconcile the demands of . . .

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pay. These moneys belong to the children. Plaintiff is a mere trustee for them. That part of the payments not reasonably necessary for support and maintenance, she must hold for the benefit of the children and account to them when they call upon her. She cannot, by contract with another person, profit at the expense of the children."

The *Goodyear* opinion did not purport to announce any rule of law unique to North Carolina; it quoted from Indiana and Iowa opinions and cited authorities from other jurisdictions.

needy citizens with the finite resources available to meet those demands." *Dandridge* v. *Williams*, 397 U. S. 471, 486, 472 (1970). Unless the Legislative Branch's decisions run afoul of some constitutional edict, any inequities created by such decisions must be remedied by the democratic processes. The District Court believed that the amendment at issue did conflict with both the Due Process Clause and the Takings Clause of the Fifth Amendment.[11] We consider these arguments in turn, and reject them.[12]

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[11] The only Court of Appeals, see *Gorrie* v. *Bowen*, 809 F. 2d 508 (CA8 1987), and virtually all of the District Courts, that have addressed challenges to the inclusion of child support or other "exclusive use" funds have upheld the validity of these amendments, see, *e. g.*, *Showers* v. *Cohen*, 645 F. Supp. 217 (MD Pa. 1986); *Sherrod* v. *Hegstrom*, 629 F. Supp. 150 (Ore. 1985); *Huber* v. *Blinzinger*, 626 F. Supp. 30 (ND Ind. 1985); *Oliver* v. *Ledbetter*, 624 F. Supp. 325 (ND Ga. 1985); *Ardister* v. *Mansour*, 627 F. Supp. 641 (WD Mich. 1986) (denying preliminary injunction); *Shonkwiler* v. *Heckler*, 628 F. Supp. 1013 (SD Ind. 1985) (denying preliminary injunction); cf. *Park* v. *Coler*, 143 Ill. App. 3d 727, 493 N. E. 2d 130 (1986); but see *Lesko* v. *Bowen*, 639 F. Supp. 1152 (ED Wis. 1986), appeal docketed, No. 86–744; *Baldwin* v. *Ledbetter*, 647 F. Supp. 623 (ND Ga. 1986), appeal docketed, No. 86–1140, stay pending appeal granted, 479 U. S. 1309 (1986) (POWELL, J., in chambers).

[12] After ruling that the DEFRA amendment of AFDC was unconstitutional, the District Court considered the form of relief appellees were entitled to. In addition to granting prospective relief, the court ordered the state defendants to "pay retroactive AFDC benefits to all families in North Carolina whose benefits were denied, reduced or terminated as a result of the enforcement" of the state regulations. 633 F. Supp., at 1563. In response to the State's argument that the Eleventh Amendment barred such a retroactive award, the District Court explained that the State had continuously been bound by the court's 1971 injunction, and that if the State believed DEFRA had changed the applicable law, it should have sought modification of the injunction. *Id.*, at 1563–1564. Because we interpret the District Court's award of both prospective and retroactive relief to rest on its holding that the DEFRA amendment was unconstitutional, and read its discussion of the 1971 injunction as responding to the State's claim that an award of retroactive benefits was barred by the Eleventh Amendment, see *Edelman* v. *Jordan*, 415 U. S. 651, 667–668 (1974), our ruling that the DEFRA amendment is constitutionally valid requires reversal of both the

III

The precepts that govern our review of appellees' due process and equal protection challenges to this program are similar to those we have applied in reviewing challenges to other parts of the Social Security Act:

> "[O]ur review is deferential. 'Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."' *Mathews* v. *De Castro*, 429 U. S. 181, 185 (1976), quoting *Helvering* v. *Davis*, 301 U. S. 619, 640 (1937)." *Bowen* v. *Owens*, 476 U. S. 340, 345 (1986).

This standard of review is premised on Congress' "plenary power to define the scope and the duration of the entitlement to . . . benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program." *Atkins* v. *Parker*, 472 U. S. 115, 129 (1985); see also *Schweiker* v. *Hogan*, 457 U. S. 569 (1982); *Califano* v. *Boles*, 443 U. S. 282, 296 (1979); *California* v. *Aznavorian*, 439 U. S. 170 (1978); *Weinberger* v. *Salfi*, 422 U. S. 749 (1975).

The District Court had before it evidence that the DEFRA amendment was severely impacting some families. For example, some noncustodial parents stopped making their support payments because they believed that their payments were helping only the State, and not their children. 633 F. Supp., at 1542–1543. It is clear, however, that in the administration of a fund that is large enough to have a significant

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District Court's award of prospective relief and its award of retroactive relief.

impact on the Nation's deficit, general rules must be examined in light of the broad purposes they are intended to serve.[13] The challenged amendment unquestionably serves Congress' goal of decreasing federal expenditures. See Senate Print, at 981 (estimating that amendment in AFDC program will save $455 million during fiscal years 1984 through 1987); 130 Cong. Rec. 8368 (1984) (remarks of Sen. Dole). The evidence that a few noncustodial parents were willing to violate the law by not making court-ordered support payments does not alter the fact that the entire program has resulted in saving huge sums of money.

The rationality of the amendment denying a family the right to exclude a supported child from the filing unit is also supported by the Government's separate interest in distributing benefits among competing needy families in a fair way. Given its perceived need to make cuts in the AFDC budget, Congress obviously sought to identify a group that would suffer less than others as a result of a reduction in benefits. When considering the plight of two five-person families, one of which receives no income at all while the other receives regular support payments for some of the minor children, it is surely reasonable for Congress to conclude that the former is in greater need than the latter. This conclusion is amply supported by Congress' assumption that child support payments received are generally beneficial to the entire family unit, see Senate Print, at 980, and by "the common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared." *Termini* v. *Califano*, 611 F. 2d 367, 370 (CA2

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[13] "General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases. *Weinberger* v. *Salfi*, 422 U. S. 749, 776." *Califano* v. *Jobst*, 434 U. S. 47, 53 (1977).

1979); see also *Lyng* v. *Castillo*, 477 U. S. 635, 638–643 (1986).[14]

It was therefore rational for Congress to adjust the AFDC program to reflect the fact that support money generally provides significant benefits for entire family units. This conclusion is not undermined by the fact that there are no doubt many families in which some—or perhaps all—of the support money is spent in a way that does not benefit the rest of the family. In determining how best to allocate limited funds among the extremely large class of needy families eligible for AFDC benefits, Congress is entitled to rely on a classwide presumption that custodial parents have used, and may legitimately use, support funds in a way that is beneficial to entire family units. As we have repeatedly explained:

> "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in

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[14] An assumption that child support payments to families receiving AFDC benefits are typically used for the entire family's needs is entirely reasonable. See Senate Print, at 980 (amendment will "ensure that the income of family members who live together and share expenses is recognized"). This conclusion does not rest on an assumption that custodial parents routinely violate state-law restrictions on the use of support money. For the requirement that the support income be used for the "benefit" of the child does not preclude its use for common expenses. Moreover, the custodial parent's duty to benefit the supported child is not necessarily served simply by spending more money on him or her than on other children living in the same home. As the District Court recognized, nothing in North Carolina law requires a custodial parent to focus only on the economic interest of the child receiving support without taking into account the emotional and psychological welfare of the child. Congress' finding that custodial parents were routinely using the support funds for the entire family thus reflects the reality that such use is typically proper since expenditures for an entire family unit typically benefit each member of the household. We do not question Congress' reliance on the Secretary of Health and Human Services' assurance that counting child support income as part of the family income "much more realistically reflects the actual home situation." Heckler Letter, App. 168–169.

> practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69–70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U. S. 420, 426." *Dandridge* v. *Williams*, 397 U. S., at 485.

See also *Weinberger* v. *Salfi*, 422 U. S., at 785. We have no doubt that the DEFRA amendment satisfies this test.[15]

Appellees argue (and the District Court ruled), however, that finding that Congress acted rationally is not enough to sustain this legislation. Rather, they claim that some form of "heightened scrutiny" is appropriate because the amendment interferes with a family's fundamental right to live in the type of family unit it chooses.[16] We conclude that the District Court erred in subjecting the DEFRA amendment to any form of heightened scrutiny. That some families may decide to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and direct effect are to "intrud[e] on choices concerning family living arrangements." *Moore* v. *East Cleveland*, 431 U. S. 494, 499 (1977).[17] As was the case with the marriage-related provision upheld in *Califano* v. *Jobst*, 434 U. S. 47 (1977), "Congress adopted this rule in the course of constructing a complex social welfare system that necessarily deals with the intimacies of family life. This is not a case in which government seeks to foist orthodoxy on the unwilling." *Id.*, at 54, n. 11.

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[15] Congress' presumption is similar to the one made in § 402(a)(31), 42 U. S. C. § 602(a)(31), which provides that portions of a stepparent's income are to be considered as part of the family income for AFDC purposes. In *Brown* v. *Heckler*, 589 F. Supp. 985 (ED Pa. 1984), aff'd, 760 F. 2d 255 (CA3 1985), the court explained that the presumption that a stepparent will assist in supporting his or her spouse's children is rational, even though stepparents are under no legal duty to assist the children, and not every stepparent does. See also *Kollett* v. *Harris*, 619 F. 2d 134 (CA1 1980) (holding that inclusion of stepparent's income as available to child in the Supplemental Security Income program was not unconstitutionally irrational).

[16] For example, the District Court had before it an affidavit from one mother who stated that she had sent a child to live with the child's father in order to avoid the requirement of including that child, and the support received from the child's father, in the AFDC unit. 633 F. Supp., at 1537–1538.

Last Term we rejected a constitutional challenge to a provision in the Federal Food Stamp Program, which determines eligibility and benefit levels on a "household" rather than an individual basis. *Lyng* v. *Castillo*, 477 U. S. 635 (1986).[18] We held that the guarantee of equal treatment in the Due Process Clause of the Fifth Amendment was not violated by the statutory requirement that generally treated parents, children, and siblings who lived together as a single household, and explained:

> "The disadvantaged class is that comprised by parents, children, and siblings. Close relatives are not a 'suspect' or 'quasi-suspect' class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless. See, *e. g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427

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[17] If the DEFRA amendment's indirect effects on family living arrangements were enough to subject the statute to heightened scrutiny, then the entire AFDC program might also be suspect since it generally provides benefits only to needy families without two resident parents. Surely this creates incentive for some needy parents to live separately. The answer, of course, is that these types of incentives are the unintended consequences of many social welfare programs, and do not call the legitimacy of the programs into question.

[18] The District Court denied appellants' motion for reconsideration in light of our decision in *Lyng*. App. to Juris. Statement in No. 86-509, p. 107a.

> U. S. 307, 313–314 (1976) *(per curiam)*. In fact, quite the contrary is true.
>
> "Nor does the statutory classification 'directly and substantially' interfere with family living arrangements and thereby burden a fundamental right. *Zablocki* v. *Redhail*, 434 U. S. 374, 386–387, and n. 12 (1978). See *id.*, at 403–404 (STEVENS, J., concurring); *Califano* v. *Jobst*, 434 U. S. 47, 58 (1977)." *Id.*, at 638.

In light of this, we concluded in *Lyng* that the "District Court erred in judging the constitutionality of the statutory distinction under 'heightened scrutiny.'" *Ibid.* In this case the District Court committed the same error. As in *Lyng*, the standard of review here is whether "Congress had a rational basis" for its decision. *Id.*, at 639. And as in *Lyng*, "the justification for the statutory classification is obvious." *Id.*, at 642. The provisions at issue do not violate the Due Process Clause.[19]

IV

Aside from holding that the amendment violated the Due Process Clause of the Fifth Amendment and its equal protection component, the District Court invalidated the DEFRA amendments as a taking of private property without just compensation. The court based this holding on the premise that a child for whom support payments are made has a right to have the support money used exclusively in his or her "best interest." Yet, the court reasoned, the requirements (1) that a custodial parent who applies for AFDC must include a child's support money in computing family income, and (2) that the support must be assigned to the State, effectively converts the support funds that were once to be used exclusively for the child's best interests into an AFDC check which, under federal law, must be used for the benefit of all the children. § 405, 42 U. S. C. § 605. Therefore, the District Court held that the State was "taking" that child's right to exclusive use of the support money. In addressing this issue, it is helpful to look first at whether the State "takes" the child's property when it considers the support payments as part of the family's income in computing AFDC eligibility. We will then consider whether the requirement that support payments be assigned to the State requires a finding that the amendments violate the taking prohibition.

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[19] Nor is there any merit in the contention that the assignment provision, see *supra*, at 591, and n. 4, violates the Due Process Clause. Once it is determined that it is permissible to include all members of the family in the unit, the assignment of the benefits typically has no adverse effect on the child receiving support. To the contrary, through the assignment provision the Government takes over the responsibility of making sure that noncustodial parents actually perform their child support obligations. The State also bears the risk of nonpayment of support, since the family receives the identical amount of AFDC (although not the $50 supplement) whether or not the absent parent makes payments. In the first 10 years following the adoption of the assignment requirement in 1975, legal paternity was established for more than 1.5 million children, more than 3.5 million support orders were established, and $6.8 billion in support obligations was collected on behalf of children in AFDC families. 1 Office of Child Support Enforcement, U. S. Dept. of Health & Human Services, A Decade of Child Support Enforcement 1975–1985: Tenth Annual Report to Congress for the Period Ending September 30, 1985, pp. iii, 6, 9–10 (1985).

Some perspective on the issue is helpful here. Had no AFDC program ever existed until 1984, and had Congress then instituted a program that took into account support payments that a family receives, it is hard to believe that we would seriously entertain an argument that the new benefit program constituted a taking. Yet, somehow, once benefits are in place and Congress sees a need to reduce them in order to save money and to distribute limited resources more fairly, the "takings" label seems to have a bit more plausibility. For legal purposes though, the two situations are identical. See *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S. 41 (1986). Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level. Thus, notwithstanding the technical legal arguments that have been advanced, it is imperative to recognize that the amendments at issue merely incorporate a definitional element into an entitlement program. It would be quite strange indeed if, by virtue of an offer to *provide* benefits to needy families through the entirely voluntary AFDC program, Congress or the States were deemed to have *taken* some of those very family members' property.

The basic requirement that the AFDC filing unit must include all family members living in the home, and therefore that support payments made on behalf of a member of the family must be considered in determining that family's level of benefits, does not even arguably take anyone's property. The family members other than the child for whom the support is being paid certainly have no takings claim, since it is clear that they have no protected property rights to continued benefits at the same level. See *Public Agencies Opposed to Social Security Entrapment, supra.* Nor does the simple inclusion of the support income in the benefit calculation have any legal effect on the child's right to have it used for his or her benefit. To the extent that a child has the right to have the support payments used in his or her "best interest," he or she fully retains that right. Of course, the effect of counting the support payments as part of the filing unit's income often reduces the family's resources, and hence increases the chances that sharing of the support money will be appropriate. See n. 13, *supra.* But given the unquestioned premise that the Government has a right to reduce AFDC benefits generally, that result does not constitute a taking of private property without just compensation.

The only possible legal basis for appellees' takings claim, therefore, is the requirement that an applicant for AFDC benefits must assign the support payments to the State, which then will remit the amount collected to the custodial parent to be used for the benefit of the entire family. This legal transformation in the status of the funds, the argument goes, modifies the child's interest in the use of the money so dramatically that it constitutes a taking of the child's property. As a practical matter, this argument places form over substance, and labels over reality. Although it is true that money which was earmarked for a specific child's or children's "best interest" becomes a part of a larger fund available for all of the children, the difference between these concepts is, as we have discussed, more theoretical than practical.[20]

In evaluating whether governmental regulation of property constitutes a "taking" we have "eschewed the development of any set formula . . . and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211, 224 (1986).

> "To aid in this determination, however, we have identified three factors which have 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' *Penn Central Transportation Co.*, [438 U. S. 104,] 124." *Id.*, at 224–225.

Here, each of these three factors refutes the conclusion that there has been a taking.

First, in evaluating the economic impact of the assignment, it is important to remember that it is the impact on the child, not on the entire family unit, that is relevant. Thus, the fact that the entire family's net income may be reduced does not necessarily mean that the amount of money spent for the benefit of a supported child will be any less than the amount of the noncustodial parent's support payments. The reality is that the money will usually continue to be used in the same manner that it was previously since the typical AFDC parent will have used the support money as part of the general family fund even without its being transferred through AFDC. See n. 13, *supra*. Moreover, any diminution in the value of the support payments for the child is mitigated by the extra $50 that the family receives as a result of the assignment, by the extra AFDC benefits that are received by the inclusion of an additional family member in the unit, and by the fact that the State is using its own enforcement power to collect the support payments, and is bearing the risk of nonpayment in any given month. Whatever the diminution in value of the child's right to have support funds used for his or her "exclusive" benefit may be, it is not so substantial as to constitute a taking under our precedents. See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 493–497 (1987); *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 131 (1978).

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[20] In analyzing the effect of the assignment it is again instructive to ask what would happen to the support payments if there were no AFDC program at all. In that case, it would appear that custodial parents would have to use a much greater portion of the support payments to sustain the family unit, since it could hardly be deemed in the child's best interest for his custodial parent and siblings to have no funds whatsoever. The overall practical effect of the AFDC program (even after the 1984 amendment), therefore, is to enhance the probability that a child whose custodial parent is receiving support payments in the child's behalf will obtain direct economic benefit from those funds, in addition to the benefits that result from preserving the family unit. A reduction in that enhancement is no more a taking than any other reduction in a Social Security program.

Second, the child receiving support payments holds no vested protectable expectation that his or her parent will continue to receive identical support payments on the child's behalf, and that the child will enjoy the same rights with respect to them. See *Layton* v. *Layton*, 263 N. C. 453, 456, 139 S. E. 2d 732, 734 (1965) (support is "not a property right of the child"). The prospective right to support payments, and the child's expectations with respect to the use of such funds, are clearly subject to modification by law, be it through judicial decree, state legislation, or congressional enactment. See N. C. Gen. Stat. § 50–13.7 (1984) (modification of order for child support). For example, one of the chief criteria in assessing a child support obligation is the noncustodial parent's ability to make payments, see *Coggins*

v. *Coggins*, 260 N. C. 765, 133 S. E. 2d 700 (1963); Douglas, Factors in Determining Child Support, 36 Juvenile & Fam. Court J., No. 3, p. 27 (1985), and an adverse change in that parent's ability may, of course, require a modification of the decree. 2 J. Atkinson, Modern Child Custody Practice § 10.25, pp. 527–528 (1986) (discussing reductions in support). Any right to have the State force a noncustodial parent to make payments is, like so many other legal rights (including AFDC payments themselves), subject to modification by "the public acts of government." *Reichelderfer* v. *Quinn*, 287 U. S. 315, 319 (1932); see generally *Public Agencies Opposed to Social Security Entrapment*, 477 U. S., at 51–56. As the District Court explained, Congress, and the States, through their implementing statutes and regulations, have modified those rights through passage of (and the States' compliance with) the DEFRA amendments. See 633 F. Supp., at 1548–1551; *Gorrie* v. *Bowen*, 809 F. 2d 508, 521 (CA8 1987). This prospective change in the child's expectations concerning future use of support payments is far from anything we have ever deemed a taking.

Finally, the character of the governmental action here militates against a finding that the States or Federal Government unconstitutionally take property through the AFDC program. It is obviously necessary for the Government to make hard choices and to balance various incentives in deciding how to allocate benefits in this type of program. But a decision to include child support as part of the family income certainly does not implicate the type of concerns that the Takings Clause protects. This is by no means an enactment that forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

The law does not require any custodial parent to apply for AFDC benefits. Surely it is reasonable to presume that a parent who does make such an application does so because she or he is convinced that the family as a whole—as well as *each* child committed to her or his custody—will be better off with the benefits than without. In making such a decision, the parent is not taking a child's property without just compensation; nor is the State doing so when it responds to that decision by supplementing the collections of support money with additional AFDC benefits.

V

Writing for a unanimous Court, Justice Stewart described the courts' role in cases such as this:

> "We do not decide today that the . . . regulation is wise, that it best fulfills the relevant social and economic objectives that [Congress] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg* v. *Kelly*, [397 U. S. 254 (1970)]. But the Constitution does not empower this Court to second-guess . . . officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams*, 397 U. S., at 487.

The judgment of the District Court is

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Government in the modern age has assumed increasing responsibility for the welfare of its citizens. This expansion of responsibility has been accompanied by an increase in the scale and complexity of the activities that government conducts. Respect for the enormity of the administrative task that confronts the modern welfare state, as well as for the scarcity of government resources, counsels that public officials enjoy discretion in determining the most effective means of fulfilling their responsibilities.[1]

The very pervasiveness of modern government, however, creates an unparalleled opportunity for intrusion on personal life. In a society in which most persons receive some form of government benefit, government has considerable leverage in shaping individual behavior. In most cases, we acknowledge that government may wield its power even when its actions likely influence choices involving personal behavior. On certain occasions, however, government intrusion into private life is so direct and substantial that we must deem it intolerable if we are to be true to our belief that there is a boundary between the public citizen and the private person.

This is such a case. The Government has told a child who lives with a mother receiving public assistance that it cannot both live with its mother and be supported by its father. The child must either leave the care and custody of the mother, or forgo the support of the father and become a Government client. The child is put to this choice not because it seeks Government benefits for itself, but because of a fact over which it has no control: the need of *other* household members for public assistance. A child who lives with one parent has, under the best of circumstances, a difficult time sustaining a relationship with both its parents. A crucial bond between a child and its parent outside the home, usually the father, is the father's commitment to care for the material needs of the child, and the expectation of the child that it may look to its father for such care. The Government has thus decreed that a condition of welfare eligibility for a mother is that her child surrender a vital connection with either the father or the mother.

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[1] As we have said with respect to the Social Security program, for instance, "[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst*, 434 U. S. 47, 53 (1977).

The Court holds that the Government need only show a rational basis for such action. This standard of review has regularly been used in evaluating the claims of applicants for Government benefits, since "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status." *Weinberger* v. *Salfi*, 422 U. S. 749, 772 (1975). Plaintiff child support recipients in this case, however, are children who wish *not* to receive public assistance, but to continue to be supported by their noncustodial parent. Their claim is *not* that the Government has unfairly denied them benefits, but that it has intruded deeply into their relationship with their parents. More than a mere rational basis is required to withstand this challenge, and, as the following analysis shows, the Government can offer no adequate justification for doing such damage to the parent-child relationship.

I

A

The family is an institution "deeply rooted in this Nation's history and tradition." *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977). Our society's special solicitude for the family reflects awareness that "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.*, at 503–504 (footnote omitted).[2] As a result, we have long recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky* v. *Kramer*, 455 U. S. 745, 753 (1982). See also *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639 (1974). Therefore, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore*, *supra*, at 499.[3]

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[2] See also *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U. S. 816, 844 (1977) (importance of the family "stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, as well as from the fact of blood relationship") (citation omitted).

A fundamental element of family life is the relationship between parent and child. As we said in *Lehr* v. *Robertson*, 463 U. S. 248, 256 (1983): "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." We have thus been vigilant in ensuring that government does not burden the ability of parent and child to sustain their vital connection. See, *e. g.*, *Santosky*, *supra*, at 753; *Stanley* v. *Illinois*, 405 U. S. 645 (1972); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923).[4]

"[T]he rights of the parents are a counterpart of the responsibilities they have assumed." *Lehr*, *supra*, at 257. When parents make a commitment to meet those responsibilities, the child has a right to rely on the unique contribution of each parent to material and emotional support. The child therefore has a fundamental interest in the continuation of parental care and support, and a right to be free of governmental action that would jeopardize it. As the next section discusses, a child in modern society faces perhaps more difficulty than ever before in sustaining a relationship with both parents.

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[3] See also *Griswold* v. *Connecticut*, 381 U. S. 479, 502 (1965) ("[T]here is a 'realm of family life which the state cannot enter' without substantial justification") (WHITE, J., concurring in judgment) (citation omitted).

[4] We have not hesitated to protect this relationship even when it has existed outside the traditional family arrangement. See, *e. g.*, *Caban* v. *Mohammed*, 441 U. S. 380 (1979) (recognizing parental interest of unwed father who had participated in raising his children); *Smith*, *supra*, at 846–847 (acknowledging fundamental liberty interest of parents whose child had been placed in temporary foster care). These cases reflect appreciation of the fact that the parent-child bond is a fundamental relationship that requires protection regardless, and perhaps especially because, of the misfortune and caprice that inevitably beset human affairs.

B

It is increasingly the case that a child in contemporary America lives in a household in which only one parent is present. The percentage of households headed by one parent has doubled since 1970, from 13% to 26%. U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Household and Family Characteristics: March 1984, p. 1 (1985) (Current Population Reports).[5] Researchers predict that "close to half of all children living in the United States today will reach age 18 without having lived continuously with both biological parents." Furstenberg, Nord, Peterson, & Zill, The Life Course of Children of Divorce: Marital Disruption and Parental Contact, 48 Am. Sociological Rev. 656, 667 (1983).

Almost 90% of single-parent households are headed by women,[6] and a considerable percentage of them face great financial difficulty. One prominent reason is that divorce "produces a precipitous decline in women's household incomes." Weiss, The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households, 46 J.

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[5] Almost 60% of all black families with children are headed by one parent, compared with only 36% in 1970. While only 1 in 10 white families were headed by a single parent in 1970, the figure is now 1 in 5. Current Population Reports at 5.

[6] Families headed by women accounted for 25% of the households added from 1980 to 1984, compared to 18% of the households added from 1970 to 1980. *Id.*, at 2. See also H. Ross & I. Sawhill, Time of Transition: The Growth of Families Headed by Women (1975).

Marriage & Fam. 115 (1984).[7] In 1977, one-half of *all* related children under age 18 in female-headed households were below the poverty level. Espenshade, The Economic Consequences of Divorce, 41 J. Marriage & Fam. 615, 616 (1979). Not surprisingly, many such households must rely on public assistance.[8]

Increasing numbers of children in this country thus reside only with their mother, in a household whose financial condition is precarious. These children have a fundamental interest in sustaining a relationship with their mother, since she is their primary source of daily emotional support. They also have a fundamental interest, of course, in sustaining a relationship with their father, whose absence from the household does not diminish the protection that must be afforded this parent-child relationship. The need for connection with the father is underscored by considerable scholarly research, which indicates that "[t]he optimal situation for the child is to have both an involved mother and an involved father." H. Biller, Paternal Deprivation 10 (1974).[9] Research indicates that maintenance of a relationship with both parents is particularly important for children whose parents have divorced: "By his or her presence or absence, the visiting parent remains central to the psychic functioning of the children." Wallerstein & Kelly, The Father-Child Relationship: Changes After Divorce, in Father and Child: Developmental and Clinical Perspectives 451, 454 (S. Cath, A. Gurwitt, & J. Ross eds. 1982).[10]

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[7] One scholar has found that "when income is compared to needs, divorced men experience an average 42 percent rise in their standard of living in the first year after the divorce, while divorced women (and their children) experience a 73 percent decline." L. Weitzman, The Divorce Revolution 323 (1985).

[8] In May 1982, of all AFDC families, only 9.4% had a father present in the home. U. S. Dept. of Health and Human Services, Findings of the May 1981-May 1982 Aid to Families With Dependent Children Study 3 (1985).

[9] "[P]aternal deprivation, including patterns of inadequate fathering as well as father absence, is a highly significant factor in the development of serious psychological and social problems." H. Biller, Paternal Deprivation 1 (1974). See also Hetherington & Deur, The Effects of Father Absence on Child Development, 26 Young Children 233, 244 (1971) ("Father absence appears to be associated with a wide range of disruptions in social and cognitive development in children").

In short, "training, nurture, and loving protection . . . are at the heart of the parental relationship protected by the Constitution," *Rivera* v. *Minnich, ante,* at 580, and a child's relationship with a father outside the home can be an important source of these benefits.

C

The Government's insistence that a child living with an AFDC mother relinquish its child support deeply intrudes on the father-child relationship, for child support is a crucial means of sustaining the bond between a child and its father outside the home. A father's support represents a way in which the father can make an important contribution to raising the child, and the benefits to the child are both financial and emotional.

Financially, child support makes available resources to help meet the child's daily material needs—resources especially important because of the financial difficulties that confront many households headed by women. Child support is also integrally related to the father's ongoing involvement in raising the child. The father is not there on a daily basis to wake the child in the morning, bring him or her to school, answer innumerable questions, offer guidance with personal problems, put the child to bed, and provide the countless doses of encouragement and consolation that daily life requires. Nonetheless, by helping to meet the child's daily material needs, the father can let the child know that the father is committed to participating in the child's upbringing. Meals, clothes, toys, and other things made possible by this support represent this commitment even when the father cannot be there to affirm it himself.[11]

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[10] See also Hetherington, Divorce: A Child's Perspective, 34 Am. Psychologist 851, 856 (1979) ("Most children wish to maintain contact with the father, and in preschool children, mourning for the father and fantasies of reconciliation may continue for several years").

The provision of support by a father outside the home therefore constitutes a parent-child relationship founded upon the pledge of the father to provide support that is responsive to the particular needs of the unique child that is the father's own.[12] Braces, special shoes, lessons—a father may not be able to provide all these things for his child, but he is entitled to try. The father may not be the custodial parent, available on a daily basis. Nonetheless, he *is* the child's father, and "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Lehr*, 463 U. S., at 262.

The role of child support in providing a "critical bond" between father and child, Brief for Juvenile and Family Court Judges as *Amicus Curiae* 23, is documented in studies on divorced families. "[C]hild support is unquestionably one of the major strands in the relationship between fathers and children during the years following divorce." Wallerstein & Huntington, *supra* n. 11, at 135. As one national study concluded:

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[11] Studies of children of divorce, for instance, indicate that "[c]hildren who were well-supported were significantly less likely to feel rejected by their father." Wallerstein & Huntington, Bread and Roses: Nonfinancial Issues Related to Fathers' Economic Support of Children Following Divorce, in The Parental Child-Support Obligation 135, 149 (J. Cassetty ed. 1983).

[12] Guidelines for those support obligations that are judicially imposed, for instance, require consideration of the needs of the particular child in question. See, *e. g.*, Uniform Marriage and Divorce Act, 9A U. L. A. § 309 (1979 and Supp. 1987) (court must consider, *inter alia*, "the physical and emotional condition of the child and his educational needs"). See also Douglas, Factors in Determining Child Support, 36 Juvenile & Fam. Court J., No. 3, p. 27 (1985).

> "The performance of the parental role, especially for males, is linked to the ability to provide material support for the child following marital dissolution. It has been suggested that lower-status males withdraw from the paternal role when they cannot contribute materially to the welfare of the child. [This study provides] evidence that fathers who pay some support are much more likely to see their children on a regular basis." Furstenberg, Nord, Peterson, & Zill, 48 Am. Sociological Rev., at 665.[13]

Thus, aside from its intrinsic importance, child support is a strand tightly interwoven with other forms of connection between father and child. Removal of this strand can unravel all the others.

Through child support, then, children in the increasing number of one-parent families in this country have a means of sustaining a relationship with both parents. The bond with the custodial parent, usually the mother, is forged through daily contact and care. The bond with the parent outside the home, usually the father, is maintained to a significant degree through provision for the child's material needs. In these ways, the family sustains the involvement of both parents in the upbringing of the child as best as the fragmentation of their lives will permit.

Such an arrangement is a hard-won accomplishment, for, sadly, the stresses of separation often result in the effective disintegration of the relationship of the child with the parent outside the home.[14] Many children report only infrequent visits from their fathers, and a large number do not receive the child support payments to which they are entitled.[15] The father outside the home and his child who sustain a relationship therefore may claim a rare and fragile achievement, for "outside parents who are committed to maintaining a relationship are a special breed and their children recognize it." Furstenberg & Nord, *supra* n. 14, at 903.

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[13] If this is the case for the father-child relationship formed after divorce, it is even more true for those relationships out of wedlock. Father and child in those instances do not, as do families of divorce, have available a fund of prior daily association on which to draw in sustaining a parent-child bond.

II

The first part of this section describes the infringement on the parent-child relationship produced by the household filing requirement. The second part demonstrates that the claim presented in these cases differs from the unsuccessful challenges to benefit programs that the Court relies upon to uphold the filing provision.

A

If a child is living with its mother and receiving support from its father, it is clear that the Government could not terminate either of these relationships without substantial justification. It could not remove the child from the custody of the mother without a compelling reason, and would have to prove its case by clear and convincing evidence to do so. *Santosky* v. *Kramer*, 455 U. S. 745 (1982). The argument that other connections might remain would be unavailing, for the custodial relationship is a vital bond between mother and child.

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[14] For children of divorce, for instance, "[m]arital disruption effectively destroys the ongoing relationship between children and the biological parent living outside the home in a majority of families." Furstenberg & Nord, Parenting Apart: Patterns of Childrearing After Marital Disruption, 47 J. Marriage & Fam. 893, 902 (1985). In one study, for instance, children with a father outside the home were asked, "When you think about your family, who specifically do you include?" Virtually all children included the biological parent with whom they were residing, and 72% mentioned their stepfather. Dishearteningly, however, only half the children included their biological father as a member of their family. *Id.*, at 899.

[15] "Despite court orders, noncustodial fathers fail to pay $4 billion in child support each year. More than half (53 percent) of the millions of women who are due child support do not receive the court-ordered support." Weitzman, *supra* n. 7, at 262 (footnote omitted). See also D. Chambers, Making Fathers Pay (1979); Hetherington, Cox, & Cox, The Aftermath of Divorce, in Mother/Child Father/Child Relationships 149, 163 (J. Stevens & M. Mathews eds. 1978).

Nor could the Government forbid the father to support his child without some powerful justification. A father is entitled to support his child, and the child is entitled to look to the father for this support. To prohibit paternal support would deny the father a crucial means of participating in the upbringing of the child, and deny the child its entitlement to receive support from a biological parent who has a deep-rooted interest in seeing that the particular needs of that child are met. The argument that other forms of connection might remain likewise would be unavailing, for a father's support of his own child is integral to sustaining the parent-child relationship.

The intrusion on the fundamental interest in family life in each of these scenarios should be apparent to us all. Yet the Government in these cases has used its economic leverage to achieve exactly the same result. It has told children who live with mothers who need AFDC that they cannot both live with their mothers and receive child support from their fathers. Rather than terminate either relationship itself, the Government requires the *child* to choose between them. It has declared that, for an indigent mother with a child receiving child support, a condition of *her* AFDC eligibility is that *her child* relinquish its fundamental constitutional interest in maintaining a vital bond with either her or the child's father.

On the one hand, if the child stays with its mother, the father is told that henceforth the Government, not he, will support the child. Unless he is wealthy enough to support the entire household, all but $50 of any support payment that the father makes will be used to reimburse the Government for making a welfare payment for use by the whole family. This conversion of the father's support payment into Government reimbursement means that the father is rendered powerless in most cases to respond to the special financial needs of his child.

It is important to illustrate why this is the case. Let us suppose that a couple with one child obtains a divorce, that the mother has a child by a previous marriage, and that the mother has custody of the two children. The mother has no source of income, but the father from whom she obtained her recent divorce provides $150 a month to support his child. If the mother desires to keep both her children, the $150 in child support must be assigned to the State. In return, the three-person household receives, let us say, $400 a month in AFDC. Of the $150 in child support assigned to the State, $50 is returned for use of the child for whom it was paid, and $100 is kept by the State as reimbursement for its welfare payment.

If the father wanted to increase the amount of child support, say to $200, because of the child's special needs, *none of the extra money would go to the child*. The family would still receive $400 in AFDC, and the child would still receive $50 of the support payment. The only difference would be that the State would now get to keep $150 as reimbursement for the welfare payment. By continuing to live with the mother, the child has lost not only the financial benefit of the father's support, but a father-child relationship founded on the father's commitment to care for the material needs of his child. If the child has a conscientious father who has shouldered his paternal duty, that father will be enlisted to help defray the cost of providing for *other* children whose fathers are not so responsible. A child thus must pay a high price for continuing to live with its mother.

This price is not merely speculative. The affidavits in these cases establish it. Diane Thomas, for instance, has two children, Crystal, aged 9, and Sherrod, aged 7. App. to Juris. Statement 22a. Although she has sought gainful employ-

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ment, she has been unable to find work. Crystal's father has almost never complied with a court order requiring him to contribute to Crystal's support. Sherrod's father, however, has voluntarily paid $200 a month on a regular basis toward Sherrod's support. Prior to October 1984, Ms. Thomas received $194 a month in AFDC for the support of herself and Crystal. In October, she received a notice that if she did not file an AFDC application for Sherrod and assign his child support to the State her assistance would be terminated. She then applied for benefits for herself and both her children, assigning Sherrod's child support rights to the State. Because the child support is now regarded as the income of the whole household, the AFDC grant has been reduced to $73 a month. Whereas Sherrod formerly had been entitled to $200 a month in support, he is now entitled to one-third of the $273 total income attributed to the household, or $91, and to $50 of his father's monthly support check assigned to the State, for a total of $141. The financial cost to Sherrod of staying with his mother is thus $59 a month.

Sherrod has paid an emotional price for continuing to live with his mother as well. Two months after the household began receiving welfare, Sherrod's father began to withhold support payments. Ms. Thomas stated: "He informed me that as long as I was going to use Sherrod's support money to keep up my daughter Crystal, he would continue to withhold the support." *Id.*, at 25a. Furthermore, he has not visited Sherrod since beginning to withhold support payments. As Ms. Thomas stated, "[Sherrod's father] is extremely opposed to his son being on welfare benefits, and has told me that he stopped seeing his son because I now receive AFDC for Sherrod." *Id.*, at 26a. Sherrod, of course, has no control over any of this, but nonetheless must suffer the loss of his father's care:

> "Sherrod is very upset that his father no longer visits him. He frequently asks me why his daddy does not come to see him anymore. Since the time his father has

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> stopped visitation, Sherrod has begun to wet his bed on a frequent basis. Also since the visitation stopped, Sherrod has become much more disruptive, especially in school. Furthermore, his performance in school seems to have declined." *Id.*, at 26a–27a.[16]

The testimony at trial in this case sheds some light on the reactions of fathers such as Sherrod's. Professor Stack of Duke University testified:

> "A law that tells fathers that their efforts cannot keep their children off the welfare rolls, or that what they can provide is not good enough, challenges the efforts and integrity of good men and fathers. Feelings of anger, frustration and shame are not inappropriate or unexpected. The anger is sometimes vented at children, sometimes at mothers, more often both." *Id.*, at 82a–83a.

North Carolina District Judge Hunt also testified about her experience in dealing with fathers who have an obligation to provide child support:

> "Many of these fathers grew up on welfare and they are very sensitive to . . . the lack of a father involved in their lives. They know and understand the pride the child feels when he or she can say 'my daddy supports me.' These fathers know firsthand that the children will grow up knowing that they are on welfare and that their mothers depend for support on a check each month from the Department of Human Resources and that food stamps buy the groceries. It isn't the same as financial and emotional support from your own father." *Id.*, at 84a.

The reaction of Sherrod's father may be misguided. It may be that he should overcome the obstacles the Government has placed in his way, and still maintain some form of involvement in Sherrod's life. The point, however, is that he should not have to try.

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[16] While Sherrod's father may be criticized, he is under no judicially imposed obligation to pay support. The record thus contains more than mere "evidence that a few noncustodial parents were willing to violate the law by not making court-ordered support payments." *Ante*, at 599.

The financial and emotional cost of losing this connection with the father may be too much for the child to bear. If so, the only way to avoid it is for the child to leave the custody of the mother. This price for continuing to receive support from the father also is not speculative. At least one of the families in this case has chosen this course. Mary Medlin has four children, one of whom, Karen, receives $200 in child support from her father, and another of whom, Jermaine, receives $50 in support. *Id.*, at 27a–28a. Ms. Medlin originally received $223 in AFDC for herself and her two other children. When, as required, she added Karen and Jermaine to the welfare rolls, her entire family became ineligible for AFDC. In order to obtain assistance for her family, she agreed to relinquish custody of Karen to her father. *Id.*, at 29a.

Karen may now keep her $200 in child support, and her mother may now obtain AFDC for herself and her other children. They may no longer, however, live in the same household. The burden of their choice hardly requires elaboration. "Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development." J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child 31–32 (rev. ed. 1979).[17] The relationship between the child and the custodial parent is a bond forged by intimate daily association, and severing it unalterably transforms the parent-child relationship. It may be that parent and child will be able to fashion some type of new relationship; even if they do, however, each has lost something of incalculable value.

It is thus clear that in these cases the Government "'directly and substantially' interfere[s] with family living arrangements and thereby burden[s] a fundamental right." *Lyng* v. *Castillo*, 477 U. S. 635, 638 (1986), quoting *Zablocki* v. *Redhail*, 434 U. S. 374, 387 (1978). The infringement is direct, because a child whose mother needs AFDC cannot escape being required to choose between living with the mother and being supported by the father. It is substantial because the consequence of that choice is damage to a relationship between parent and child. Furthermore, the Government has created an inherent conflict between the interests of the father and the mother. As the record in these cases testifies, a typical father will feel strongly that his son should be supported by him and not by public assistance. The typical mother will feel that loss of the father's support is a price worth paying to keep the child with her. The child may well be swept up in a custody dispute over which living arrangement is in its best interest, especially given the recent trend toward easier modification of custody arrangements. See Wexler, Rethinking the Modification of Child Custody Decrees, 94 Yale L. J. 757, 760–782 (1985). In short, the Government has sliced deeply into family life, pitting father against mother, with the child in the middle.

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[17] See also Bowlby, Attachment and Loss: Retrospect and Prospect, 52 Am. J. Orthopsychiatry 664, 666 (1982).

B

The nature of the interest asserted in these cases, as well as the direct disruption produced by the Government, distinguishes this litigation from typical challenges to the operation of Government benefit programs.

First, unlike those cases on which the Court relies, plaintiff children receiving child support do *not* assert that they have been unfairly denied a Government benefit. Rather, they claim that the Government has deeply intruded on their relationships with their parents. In *Weinberger*, we directly acknowledged the difference between these two types of claims: "*Unlike the claims involved in* Stanley *and* LaFleur, a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status." 422 U. S., at 771–772 (emphasis added). The children in these cases obviously present claims based on the constitutionally protected interest in family life involved in *Stanley* and *LaFleur*. Their claims thus must be met by more than a mere demonstration that there is some plausible basis for the Government's action.

This leads to a second point. We are willing to accept the validity of many conditions on participation in Government programs because this Court has never held that anyone has an absolute right to receive public assistance. The Court has thus assumed that participation in a benefit program reflects a decision by a recipient that he or she is better off by meeting whatever conditions are attached to participation than not receiving benefits. In assessing the burdens imposed by a program, then, the theory has been that whatever reasonable burdens are borne by the recipient are willingly assumed. Thus, for instance, if a child, through its mother, voluntarily wishes to participate in the AFDC program, the requirement that child support be assigned to the State is one of the conditions to which a recipient is deemed to have freely consented. See 42 U. S. C. § 602(a)(26) (1982 ed., Supp. III).

In these cases, however, the burden placed on the child is not the result of his or her voluntary application for AFDC benefits. Indeed, participants in this litigation are children who do *not* wish to receive AFDC. Rather, the child must choose between the father and mother solely because *other* household members are indigent and desire public assistance. It is the presence of *these* persons in the household, not the child's voluntary application for public assistance, that triggers the requirement that it choose which parental relationship to maintain.

The Government has thus placed a burden on the child's fundamental interest in a relationship with both parents on the basis of a factor over which the child has no control. What we said with respect to illegitimacy in *Weber* v. *Aetna*

Casualty & Surety Co., 406 U. S. 164, 175 (1972), is equally applicable here: imposing such a burden "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent." See also *Trimble* v. *Gordon*, 430 U. S. 762, 770 (1977) (children "can affect neither their parents' conduct nor their own status"). The paradigm of the willing AFDC participant is inapplicable in this case, for the child's fundamental rights are infringed so that *other* members of the household can receive the assistance that *they* desire. In insisting that the mother use one child's support to purchase AFDC for other household members, the Government ignores our pronouncement in *Prince* v. *Massachusetts*, 321 U. S. 158, 170 (1944): "Parents may be free to become martyrs themselves. But it does not follow that they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."

Finally, the disruption directly produced by the household filing requirement distinguishes these cases from cases in which we have upheld Government benefit provisions from a challenge that they interfered with family life. In *Lyng*, *supra*, for instance, we upheld the food stamp program's presumption that parents, children, and siblings who live together constitute a single "household," so that such persons could not individually apply for benefits as separate households. We noted that the definition "does not order or prevent any group of persons from dining together. Indeed, in the overwhelming majority of cases it probably has no effect at all." *Id.*, at 638. In *Califano* v. *Jobst*, 434 U. S. 47 (1977), we upheld a provision whereby a recipient of dependent Social Security benefits lost those benefits upon marriage to anyone other than another beneficiary, even though we acknowledged that the provision "may have an impact on a secondary beneficiary's desire to marry, and may make some suitors less welcome than others." *Id.*, at 58. These cases reflect recognition that the extensive activities of Government in modern society inevitably have the potential for creating incentives and disincentives for certain behavior. By itself, plausible speculation about the effect of Government programs generally cannot provide the basis for a constitutional challenge.

In these cases, however, the impact of Government action is not speculative, but direct and substantial. If a child support recipient lives with a mother who needs public assistance, AFDC will be provided *only* if the child either leaves the household or gives up its right to support from its father. Determining whether other eligibility requirements for Government assistance will influence family choices may call for subtle inquiry into the nuances of human motivation. Here, however, the burden on family life is inescapable, because it is *directly required* by the Government as a condition of obtaining benefits. "'Governmental imposition of such a choice puts the same kind of burden upon [the child's rights] as would a fine imposed against'" the child for living with its mother or being supported by its father. *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 140 (1987) (citation omitted).

The Court contends that applying heightened scrutiny in this case would jeopardize AFDC's general requirement that AFDC be available only to families without two resident parents, *ante*, at 602, n. 17. Assuming, *arguendo*, that the latter provision would not elicit heightened scrutiny, it is distinguishable from the one at issue in these cases. Since the regulation in these cases applies *only* to households in which a child support recipient lives, we know that a condition of AFDC eligibility for every household covered by the regulation is that a child choose between parental relationships. We thus know that this eligibility provision will intrude on family life in every case in which it is applicable. We cannot say the same of a general eligibility provision, such as the requirement that AFDC be given only to families without two resident parents. Many households will be able to obtain AFDC without any intrusion on family life, since they would only have one parent present in any event. Our speculation that the single-parent requirement *might* affect the family decisions of *some* households to which it applies is thus far different from our certainty that the support assignment requirement *will* affect the family decisions of *every* household to which it applies.

The contention in these cases is therefore that the Government as a condition of AFDC eligibility will inevitably burden the fundamental interest of a child in maintaining a custodial relationship with its mother and a support relationship with its father. Such a burden must be justified by more than a mere assertion that the provision is rational.

III

Turning first to the Government's purpose in enacting the provision at issue in these cases, the Government urges that the change in the household filing requirement was meant to be a "rational means of carrying out Congress's conclusion that families whose members have access to additional sources of income have less need for government assistance than families without access to such income." Brief for Federal Appellant 41.

This concern for program efficiency is certainly a valid objective, and serves to justify governmental action in most cases. It cannot in itself, however, provide a purpose sufficiently important to justify an infringement on fundamental constitutional rights. If it could, its reach would be limitless, for it is probably more efficient in most cases for Government to operate without regard to the obstacles of the Constitution than to attend to them. Nonetheless, "the Constitution recognizes higher values than speed and efficiency." *Stanley*, 405 U. S., at 656. It is true that Congress could, if it chose, completely eliminate the AFDC program in order to save money, for this Court has held that no one may claim a constitutional right to public assistance. Having chosen to operate such a program, however, it may not invoke the efficiency of that program as a basis for infringing the constitutional rights of recipients. See, *e. g., Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969) (in equal protection context, "[t]he saving of welfare costs cannot justify an otherwise invidious classification"). Surely no one could contend, for instance that a concern for limiting welfare outlays could justify mandatory sterilization of AFDC beneficiaries, or the forfeiture of all personal possessions. "Indeed," as we have said:

> "one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley, supra*, at 656.

Thus, the Government's desire to target AFDC payments more efficiently cannot in itself serve to justify infringement of the child's fundamental interest in living with its mother and being supported by its father. Even if a concern for program efficiency could serve as a sufficiently important objective in this context, however, the Government need not infringe upon family life in order to accomplish it.

It may well be unrealistic to assume that *no* child support is available as a common household resource, given the fact that a child enjoys such common benefits as shelter, utilities, and food. It is thus reasonable to account for the reality of household living by assuming that a portion of the child support payment is used to meet the child's share of these common expenses. Thus, the Government could regard as household income that portion of the support payment that represents the child's pro rata share of common expenses. This calculation could be done easily for each household size, and would require no case-by-case determinations. Such attribution of income would require no pre-emption of state child support law, since the use of support payments to meet the child's share of such common expenses is consistent with state-law requirements that child support be used solely for the benefit of the child.[18]

At the same time, such a provision leaves intact the father-child support bond. In making a commitment to meet the particular needs of his child, the father surely realizes that some of those needs are common needs for which it is only fair to seek a contribution from the child. This is far different, however, from assuming that the *entire* child support payment is available for the whole household. The father's unique relationship is with his child, not with other members of the household, and the father and child, not the Government, should be the ones to decide if it should continue.

If the Government is concerned that some mothers may be violating their fiduciary duty to their child by using the support payment for all household members, it could easily require as a condition of AFDC participation that the mother account for the use of child support money. If the money is in fact being used for everyone, the father is not simply supporting his child, but everyone, so that the child has no special parental support relationship different from any other child in the household. In that case, it is fair to require the assignment of child support to the Government, since this requirement does not represent the child's relinquishment of a distinctive father-child bond. The assignment provision in such an instance does no more than reflect the family members' own decision about how the child support should be used. It may be that the accounting will inform the father that the money is being used against his wishes, so that he will demand that it be used for his child. Families may resolve this disagreement in various ways, but the resolution will reflect the decision of the parents, not the Government, as to the best way to meet the needs of the child.

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[18] See, *e. g.*, N. C. Gen. Stat. § 50-13.4(d) (1984) (child support payments for minor child must be paid to custodian "for the benefit of such child"). See also *Goodyear* v. *Goodyear*, 257 N. C. 374, 379, 126 S. E. 2d 113, 117 (1962) (parent is trustee for children who receive support, and may use payments only "for the benefit of [these] children"). It is true that benefits to other household members may redound to the benefit of the child. There must be some limit to such attribution of benefits, however, if we are to adhere to our tradition that the welfare of the individual is not completely reducible to the welfare of the group.

If an accounting revealed that some, but not all, of the support were used for the needs of other household members, the Government would be free to attribute this amount as household income, and to require the assignment of some representative portion of the support payment. That portion used or saved for the child's special needs, however, could not go to the Government, for it represents the father's commitment to meeting the particular needs of his child. These funds may be used to permit the child to pursue a particular interest, to help defray the cost of special training necessary because of a learning disability, or to save for the child's education. Whatever the use to which the money is put, the child knows that it may look to its father for it. The allocation of the support payment between the needs of the child and those of other household members represents the decision of family members, not the Government, as to how best to raise the child.

Finally, to the extent that Congress sought to give recognition to the fact that individuals living together enjoy some economies of scale, *ante*, at 599, this could be addressed far less disruptively. The Government need only require that the child support recipient be included in the calculation of household size. Since per capita AFDC payments are lower the larger the household, this measure would accomplish the Government's end while not intruding on the parent-child relationship.

The Government's justification for its direct and substantial infringement on parent-child relationships thus falls short. As salutary as a desire for cost-effective program management may be, alone it is not a purpose of adequate magnitude to warrant such infringement. Even if it were, the Government need not abandon its desire to target AFDC more efficiently in order to avoid direct intrusion into the intimate domain of family life. Measures are available that would achieve a more realistic consideration of household income while still permitting a child to sustain vital bonds with both its father and mother. As a result, the household filing requirement cannot withstand constitutional scrutiny. This conclusion does not represent an effort to second-guess Congress as to the most effective use of its funds, nor does it represent a threat to the discretion that program officials must inevitably exercise. Rather, it reflects adherence to the principle that on those occasions that the Government deeply and directly intrudes on basic family relationships, there must be a powerful justification for doing so.

IV

In The Republic and in The Laws, Plato offered a vision of a unified society, where the needs of children are met not by parents but by the government, and where no intermediate forms of association stand between the individual and the state. 2 The Dialogues of Plato 163 (B. Jowett transl. 1953); 4 *id.*, at 189. The vision is a brilliant one, but it is not our own:

> "Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution." *Meyer*, 262 U. S., at 402.

If we are far removed from the Platonic Republic, it is because our commitment to diversity and decentralized human relationships has made us attentive to the danger of Government intrusion on private life. Those who are affected by the Government in these cases are fathers and children who have sustained a relationship whereby the child is supported by the father, not dependent on the State. The State has told the child that if it is to live with a mother not so fortunate, it too must become a dependent of the State. If it does so, the child's material needs will no longer met by a father's attention to his particular child. Rather, the child will be one of many who are supported by the Government, and the father, powerless to direct assistance to his child, can only reimburse the Government for supporting the entire household. Such an arrangement calls to mind Aristotle's criticism of the family in Plato's Republic: "[E]ach citizen will have a thousand sons: they will not be the sons of each citizen individually: any and every son will be equally the son of any and every father; and the result will be that every son will be equally neglected by every father." The Politics of Aristotle 44 (E. Barker transl. 1958). Regardless of the benevolence with which it is issued, a Government check is no substitute for the personal support of a loving father.

"Happy families," wrote Tolstoy, "are all alike; every unhappy family is unhappy in its own way." L. Tolstoy, Anna Karenina 1 (C. Garnett transl. 1978). Contemporary life offers countless ways in which family life can be fractured and families made unhappy. The children who increasingly live in these families are entitled to the chance to sustain a special relationship with both their fathers and their mothers, regardless of how difficult that may be. Parents are entitled to provide both daily emotional solace and to meet their child's material needs; the fact that in some families a different parent may take on each role does not diminish the child's right to the care of both parents. The Government could not prohibit parents from performing these duties, and what it cannot do by direct fiat it should not be able to do by economic force. The Government has decreed that the only way a child can live with its mother and be supported by its father is if the mother is wealthy enough not to require public assistance. A child cannot be held responsible for the indigency of its mother, and should not be forced to choose between parents because of something so clearly out of its control. No society can assure its children that there will be no unhappy families. It *can* tell them, however, that their Government will not be allowed to contribute to the pain.

I dissent.

JUSTICE BLACKMUN, dissenting.

I am in general agreement with much of what JUSTICE BRENNAN has said in Parts I, II, and III of his opinion. I therefore also dissent from the judgment of the Court.

ANDERSON *v.* CREIGHTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-1520. Argued February 23, 1987—Decided June 25, 1987

Petitioner, a Federal Bureau of Investigation agent, participated with other law enforcement officers in a warrantless search of respondents' home. The search was conducted because petitioner believed that one Dixon, who was suspected of a bank robbery committed earlier that day, might be found there, but he was not. Respondents filed a state-court action against petitioner, asserting a claim for damages under the Fourth Amendment. Petitioner removed the suit to Federal District Court and then filed a motion for dismissal or summary judgment, arguing that the Fourth Amendment claim was barred by his qualified immunity from civil damages liability. Before any discovery occurred, the court granted summary judgment on the ground that the search was lawful. The Court of Appeals reversed, holding that the search's lawfulness could not be determined on summary judgment, because factual disputes precluded deciding as a matter of law that the search was supported by probable cause and exigent circumstances. The court also held that petitioner was not entitled to summary judgment on qualified immunity grounds, since the right he allegedly violated—the right of persons to be protected from warrantless searches of their homes unless the searching officers have probable cause and there are exigent circumstances—was clearly established.

Held:

1. Petitioner is entitled to summary judgment on qualified immunity grounds if he can establish as a matter of law that a reasonable officer could have believed that the search comported with the Fourth Amendment even though it actually did not. Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken. *Harlow* v. *Fitzgerald*, 457 U. S. 800. In order to conclude that the right which the official allegedly violated is "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The Court of Appeals—which apparently considered only the fact that the right to be free from warrantless searches of one's home unless the searching officers have probable cause

and there are exigent circumstances was clearly established—erred by refusing to consider the argument that it was *not* clearly established that the circumstances with which petitioner was confronted did not constitute probable cause and exigent circumstances. The relevant question here is the objective question whether a reasonable officer could have believed petitioner's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Petitioner's subjective beliefs about the search are irrelevant. Pp. 638–641.

2. There is no merit to respondents' argument that it is inappropriate to give officials alleged to have violated the Fourth Amendment—and thus necessarily to have *unreasonably* searched or seized—the protection of a qualified immunity intended only to protect *reasonable* official action. Such argument is foreclosed by the fact that this Court has previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment. Also without merit is respondents' suggestion that *Mitchell* v. *Forsyth*, 472 U. S. 511, be overruled by holding that qualified immunity may never be extended to officials who conduct unlawful warrantless searches. Nor is there any merit to respondents' contention that no immunity should be provided to police officers who conduct unlawful warrantless searches of innocent third parties' homes in search of fugitives. Pp. 642–646.

766 F. 2d 1269, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, p. 647.

Andrew J. Pincus argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Ayer*, *Barbara L. Herwig*, and *Richard A. Olderman*.

John P. Sheehy argued the cause *pro hac vice* for respondents. With him on the brief was *Ronald I. Meshbesher*.*

JUSTICE SCALIA delivered the opinion of the Court.

The question presented is whether a federal law enforcement officer who participates in a search that violates the Fourth Amendment may be held personally liable for money

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**David Rudovsky*, *Jack D. Novik*, and *Michael Avery* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

damages if a reasonable officer could have believed that the search comported with the Fourth Amendment.

I

Petitioner Russell Anderson is an agent of the Federal Bureau of Investigation. On November 11, 1983, Anderson and other state and federal law enforcement officers conducted a warrantless search of the home of respondents, the Creighton family. The search was conducted because Anderson believed that Vadaain Dixon, a man suspected of a bank robbery committed earlier that day, might be found there. He was not.

The Creightons later filed suit against Anderson in a Minnesota state court, asserting among other things a claim for money damages under the Fourth Amendment, see *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).[1] After removing the suit to Federal District Court, Anderson filed a motion to dismiss or for summary judgment, arguing that the *Bivens* claim was barred by Anderson's qualified immunity from civil damages liability. See *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). Before any discovery took place, the District Court granted summary judgment on the ground that the search was lawful, holding that the undisputed facts revealed that Anderson had had probable cause to search the Creighton's home and that his failure to obtain a warrant was justified by the presence of exigent circumstances. App. to Pet. for Cert. 23a–25a.

The Creightons appealed to the Court of Appeals for the Eighth Circuit, which reversed. *Creighton* v. *St. Paul*, 766 F. 2d 1269 (1985). The Court of Appeals held that the issue of the lawfulness of the search could not properly be decided on summary judgment, because unresolved factual disputes made it impossible to determine as a matter of law that the warrantless search had been supported by probable cause and exigent circumstances. *Id.*, at 1272–1276. The Court of Appeals also held that Anderson was not entitled to summary judgment on qualified immunity grounds, since the right Anderson was alleged to have violated—the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances—was clearly established. *Ibid.*

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[1] The Creightons also named other defendants and advanced various other claims against both Anderson and the other defendants. Only the *Bivens* claim against Anderson remains at issue in this case, however.

Anderson filed a petition for certiorari, arguing that the Court of Appeals erred by refusing to consider his argument that he was entitled to summary judgment on qualified immunity grounds if he could establish as a matter of law that a reasonable officer could have believed the search to be lawful. We granted the petition, 478 U. S. 1003 (1986), to consider that important question.

II

When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow* v. *Fitzgerald*, 457 U. S., at 814. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Ibid.* Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, *e. g.*, *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *id.*, at 344–345 (police officers applying for warrants are immune if a reasonable officer could have believed that there was probable cause to support the application); *Mitchell* v. *Forsyth*, 472 U. S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions" they took); *Davis* v. *Scherer*, 468 U. S. 183, 191 (1984); *id.*, at 198 (BRENNAN, J., concurring in part and dissenting in part); *Harlow* v. *Fitzgerald*, *supra*, at 819. Cf., *e. g.*, *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978). Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, *Harlow*, 457 U. S., at 819, assessed in light of the legal rules that were "clearly established" at the time it was taken, *id.*, at 818.

The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Davis*, *supra* at 195.[2] It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell*, *supra*, at 535, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent. See, *e. g.*, *Malley*, *supra*, at 344–345; *Mitchell*, *supra*, at 528; *Davis*, *supra*, at 191, 195.

Anderson contends that the Court of Appeals misapplied these principles. We agree. The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated—the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances—was clearly established. The Court of Appeals specifically refused to consider the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. The previous discussion should make clear that this refusal was erroneous. It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable. See *Malley*, *supra*, at 344–345. The same is true of their conclusions regarding exigent circumstances.

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[2] The dissent, which seemingly would adopt this approach, seeks to avoid the unqualified liability that would follow by advancing the suggestion that officials generally (though not law enforcement officials, see *post*, at 654, 661–662, and officials accused of violating the Fourth Amendment, see *post*, at 659–667) be permitted to raise a defense of reasonable good faith, which apparently could be asserted and proved only at trial. See *post*, at 653. But even when so modified (and even for the fortunate officials to whom the modification applies) the approach would totally abandon the concern—which was the driving force behind *Harlow*'s substantial reformulation of qualified-immunity principles—that "insubstantial claims" against government officials be resolved prior to discovery and on summary judgment if possible. *Harlow*, 457 U. S., at 818–819. A passably clever plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated, and the good-faith defense envisioned by the dissent would be available only at trial.

It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials. But contrary to the Creightons' assertion, this does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize. See *Harlow*, 457 U. S., at 815–820. The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant.

The principles of qualified immunity that we reaffirm today require that Anderson be permitted to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing warrantless searches, he could, as a matter of law, reasonably have believed that the search of the Creightons' home was lawful.[3]

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[3] The Creightons argue that the qualified immunity doctrine need not be expanded to apply to the circumstances of this case, because the Federal

III

In addition to relying on the reasoning of the Court of Appeals, the Creightons advance three alternative grounds for affirmance. All of these take the same form, *i. e.*, that even if Anderson is entitled to qualified immunity under the usual principles of qualified immunity law we have just described, an exception should be made to those principles in the circumstances of this case. We note at the outset the heavy burden this argument must sustain to be successful. We have emphasized that the doctrine of qualified immunity reflects a balance that has been struck "across the board," *Harlow*, *supra*, at 821 (BRENNAN, J., concurring). See also *Malley*, 475 U. S., at 340 ("'For executive officers in general, . . . qualified immunity represents the norm'" (quoting *Harlow*, *supra*, at 807)).[4] Although we have in narrow circumstances provided officials with an absolute immunity, see,

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Government and various state governments have established programs through which they reimburse officials for expenses and liability incurred in suits challenging actions they have taken in their official capacities. Because our holding today does not extend official qualified immunity beyond the bounds articulated in *Harlow* and our subsequent cases, an argument as to why we should not do so is beside the point. Moreover, even assuming that conscientious officials care only about their personal liability and not the liability of the government they serve, the Creightons do not and could not reasonably contend that the programs to which they refer make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases. See 28 CFR § 50.15(c) (1987) (*permitting* reimbursement of Department of Justice employees when the Attorney General finds reimbursement appropriate); 5 F. Harper, F. James, & O. Gray, Law of Torts § 29.9, n. 20 (2d ed. 1986) (listing various state programs).

[4] These decisions demonstrate the emptiness of the dissent's assertion that "[t]oday this Court makes the fundamental error of simply assuming that *Harlow* immunity is just as appropriate for federal law enforcement officers . . . as it is for high government officials." *Post*, at 654 (footnote omitted). Just last Term the Court unanimously held that state and federal law enforcement officers were protected by the qualified immunity described in *Harlow*. *Malley* v. *Briggs*, 475 U. S. 335 (1986). We see no reason to overrule that holding.

e. g., Nixon v. *Fitzgerald*, 457 U. S. 731 (1982), we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide. With that observation in mind, we turn to the particular arguments advanced by the Creightons.

First, and most broadly, the Creightons argue that it is inappropriate to give officials alleged to have violated the Fourth Amendment—and thus necessarily to have *unreasonably* searched or seized—the protection of a qualified immunity intended only to protect reasonable official action. It is not possible, that is, to say that one "reasonably" acted unreasonably. The short answer to this argument is that it is foreclosed by the fact that we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment. See *Malley, supra* (police officers alleged to have caused an unconstitutional arrest); *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985) (officials alleged to have conducted warrantless wiretaps). Even if that were not so, however, we would still find the argument unpersuasive. Its surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term, such as "undue" searches and seizures been employed, what might be termed the "reasonably unreasonable" argument against application of *Harlow* to the Fourth Amendment would not be available—just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term "reasonable process of law" had been employed there. The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable, so that the Creightons' objection, if it has any substance, applies to the application of *Harlow* generally. We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. See, *e. g.*, *Malley*, *supra*, at 341. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

For the same reasons, we also reject the Creightons' narrower suggestion that we overrule *Mitchell*, *supra* (extending qualified immunity to officials who conducted warrantless wiretaps), by holding that qualified immunity may never be extended to officials who conduct unlawful warrantless searches.

Finally, we reject the Creightons' narrowest and most procrustean proposal: that no immunity should be provided to police officers who conduct unlawful warrantless searches of innocent third parties' homes in search of fugitives. They rest this proposal on the assertion that officers conducting such searches were strictly liable at English common law if the fugitive was not present. See, *e. g.*, *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765). Although it is true that we have observed that our determinations as to the scope of official immunity are made in the light of the "common-law tradition,"[5] *Malley*, *supra*, at 342, we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action. See *Harlow*, 457 U. S., at 815–820. As we noted before, *Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied "across the board."

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[5] Of course, it is the American rather than the English common-law tradition that is relevant, cf. *Malley*, *supra*, at 340–342; and the American rule appears to have been considerably less draconian than the English. See Restatement (Second) of Torts §§ 204, 206 (1965) (officers with an arrest warrant are privileged to enter a third party's house to effect arrest if they reasonably believe the fugitive to be there).

The approach suggested by the Creightons would introduce into qualified immunity analysis a complexity rivaling that which we found sufficiently daunting to deter us from tailoring the doctrine to the nature of officials' duties or of the rights allegedly violated. See *supra*, at 642–643. Just in the field of unlawful arrests, for example, a cursory examination of the Restatement (Second) of Torts (1965) suggests that special exceptions from the general rule of qualified immunity would have to be made for arrests pursuant to a warrant but outside the jurisdiction of the issuing authority, §§ 122, 129(a), arrests after the warrant had lapsed, §§ 122, 130(a), and arrests without a warrant, § 121. Both the complexity and the unsuitability of this approach are betrayed by the fact that the Creightons' proposal itself does not actually apply the musty rule that is purportedly its justification but instead suggests an exception to qualified immunity for all fugitive searches of third parties' dwellings, and not merely (as the English rule appears to have provided) for all *unsuccessful* fugitive searches of third parties' dwellings. Moreover, from the sources cited by the Creightons it appears to have been a corollary of the English rule that where the search *was* successful, no civil action would lie, whether or not probable cause for the search existed. That also is (quite prudently but quite illogically) not urged upon us in the Creightons' selective use of the common law.

The general rule of qualified immunity is intended to provide government officials with the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Davis*, 468 U. S., at 195. Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of the English and American common law. We are unwilling to Balkanize the rule of qualified immunity by carving exceptions at the level of detail the Creightons propose. We therefore decline to make an exception to the general rule of qualified immunity for cases involving allegedly unlawful warrantless searches of innocent third parties' homes in search of fugitives.

For the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.[6]

It is so ordered.

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[6] Noting that no discovery has yet taken place, the Creightons renew their argument that, whatever the appropriate qualified immunity standard, some discovery would be required before Anderson's summary judgment motion could be granted. We think the matter somewhat more complicated. One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." 457 U. S., at 817 (footnote omitted). For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation. *Id.*, at 818. See also *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1986). Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. Cf. *ibid.* If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful),

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This case is beguiling in its apparent simplicity. The Court accordingly represents its task as the clarification of the settled principles of qualified immunity that apply in damages suits brought against federal officials. Its opinion, however, announces a new rule of law that protects federal agents who make forcible nighttime entries into the homes of innocent citizens without probable cause, without a warrant, and without any valid emergency justification for their warrantless search. The Court stunningly restricts the constitutional accountability of the police by creating a false dichotomy between police entitlement to summary judgment on immunity grounds and damages liability for every police misstep, by responding to this dichotomy with an uncritical application of the precedents of qualified immunity that we have developed for a quite different group of high public office holders, and by displaying remarkably little fidelity to the countervailing principles of individual liberty and privacy that infuse the Fourth Amendment.[1] Before I turn to the Court's opinion, it is appropriate to identify the issue confronted by the Court of Appeals. It is now apparent that it was correct in vacating the District Court's award of summary judgment to petitioner in advance of discovery.

I

The Court of Appeals understood the principle of qualified immunity as implemented in *Harlow* v. *Fitzgerald*, 457 U. S.

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then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.

[1] The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

800 (1982), to shield government officials performing discretionary functions from exposure to damages liability unless their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. Applying this principle, the Court of Appeals held that respondents' Fourth Amendment rights and the "exigent circumstances" doctrine were "clearly established" at the time of the search. *Creighton* v. *St. Paul*, 766 F. 2d 1269, 1277 (CA8 1985). Moreover, apparently referring to the "extraordinary circumstances" defense left open in *Harlow* for a defendant who "can prove that he neither knew nor should have known of the relevant legal standard," 457 U. S., at 819, the Court determined that petitioner could not reasonably have been unaware of these clearly established principles of law. Thus, in reviewing the Court of Appeals' judgment rejecting petitioner Anderson's claim to immunity, the first question to be decided is whether *Harlow* v. *Fitzgerald* requires immunity for a federal law enforcement agent who advances the fact-specific claim that a reasonable person in his position could have believed that his particular conduct would not violate rights that he concedes are clearly established. A negative answer to that question is required, both because *Harlow* provides an inappropriate measure of immunity when police acts that violate the Fourth Amendment are challenged, and also because petitioner cannot make the showing required for *Harlow* immunity. Second, apart from the particular requirements of the *Harlow* doctrine, a full review of the Court of Appeals' judgment raises the question whether this Court should approve a double standard of reasonableness—the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable. Because a careful analysis of the *Harlow*-related set of questions will be helpful in assessing the Court's continuing embrace of a double standard of reasonableness, I begin with

a discussion of petitioner's claim of entitlement to *Harlow* immunity.

II

Accepting for the moment the Court's double standard of reasonableness, I would affirm the judgment of the Court of Appeals because it correctly concluded that petitioner has not satisfied the *Harlow* standard for immunity. The inquiry upon which the immunity determination hinges in this case illustrates an important limitation on the reach of the Court's opinion in *Harlow*. The defendants' claims to immunity at the summary judgment stage in *Harlow* and in *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985), were bolstered by two policy concerns that are attenuated in suits against law enforcement agents in the field based on the Fourth Amendment. One was the substantial public interest in allowing government officials to devote their time and energy to the press of public business without the burden and distractions that invariably accompany the defense of a lawsuit. *Harlow*, 457 U. S., at 816–817; *Mitchell*, 472 U. S., at 524. The second underpinning of *Harlow* was the special unfairness associated with charging government officials with knowledge of a rule of law that had not yet been clearly recognized. *Harlow*, 457 U. S., at 818; *Mitchell*, 472 U. S., at 535.[2] Thus, if the plaintiff's claim was predicated on a principle of law that was not clearly established at the time of the alleged wrong, both of those concerns would favor a determination of immunity not only in advance of trial, but of equal importance, before the time-consuming pretrial discovery process commenced. Concern for the depletion and diversion of public officials' energies led the Court in *Harlow* to abolish the doctrine that an official would be deprived of immunity on summary judgment if the plaintiff alleged that the official had acted with malicious intent to deprive his constitutional rights. See, *e. g.*, *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975).

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[2] This theme also pervades our pre-*Harlow* opinions construing the scope of official immunity in suits brought under 42 U. S. C. § 1983. Those precedents provide guidance for causes of action based directly on the Constitution, for "it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'" *Harlow* v. *Fitzgerald*, 457 U. S., at 818, n. 30 (quoting *Butz* v. *Economou*, 438 U. S. 478, 504 (1978)). Accord, *Malley* v. *Briggs*, 475 U. S. 335, 340, n. 2 (1986). While it is unfair to expect officials to anticipate changes in the law with a prescience that escapes even the most able scholars, lawyers, and judges, our precedents recognize that qualified immunity is entirely consistent with the requirement that federal officials act in a way that is consistent with an awareness of the fundamental constitutional rights enumerated in the Bill of Rights of the Constitution. In

The Court's decision today, however, fails to recognize that *Harlow*'s removal of one arrow from the plaintiff's arsenal at

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Scheuer v. *Rhodes*, 416 U. S. 232, 247–248 (1974), we based the qualified immunity of high government officials for official acts upon "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief." In *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975), we observed that a standard of "knowledge of the basic, unquestioned constitutional rights" of students "imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system." In *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), we ruled that the immunity inquiry was, in relevant part, whether a state hospital superintendent charged with unconstitutionally confining a patient knew or reasonably should have known that his action would violate the patient's constitutional rights. And in *Procunier* v. *Navarette*, 434 U. S. 555, 565 (1978), the Court wrote:

> "Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as being in good faith.' *Wood* v. *Strickland*, 420 U. S., at 322."

Thus, even the immunity of officials whose discretionary duties are broader than those of a law enforcement officer does not extend to conduct which they should have known was contrary to a constitutional norm. *Harlow* did not change this rule. See 457 U. S., at 819. Even if it were appropriate to apply this standard of immunity to law enforcement agents in the field, it should certainly provide no shield for a warrantless nighttime search of a private home that was unsupported by probable cause.

the summary judgment stage did not also preclude the official from advancing a good-faith reasonableness claim at trial if *the character of his conduct* as established by the evidence warranted this strategy. The rule of the *Harlow* case, in contrast, focuses on *the character of the plaintiff's legal claim* and, when properly invoked, protects the government executive from spending his time in depositions, document review, and conferences about litigation strategy. Consistently with this overriding concern to avoid "the litigation of the subjective good faith of government officials," 457 U. S., at 816, *Harlow* does not allow discovery until the issue whether the official's alleged conduct violated a clearly established constitutional right has been determined on a motion for summary judgment. *Id.*, at 818. *Harlow* implicitly assumed that many immunity issues could be determined as a matter of law before the parties had exchanged depositions, answers to interrogatories, and admissions.[3]

The considerations underlying the formulation of the immunity rule in *Harlow* for Executive Branch officials, however, are quite distinct from those that led the Court to its prior recognition of immunity for federal law enforcement officials in suits against them founded on the Constitution. This observation is hardly surprising, for the question of immunity only acquires importance once a cause of action is created; the "practical consequences of a holding that no remedy has been authorized against a public official are essentially the same as those flowing from a conclusion that the official has absolute immunity." *Mitchell* v. *Forsyth*, 472 U. S., at 538 (STEVENS, J., concurring in judgment). Probing the question of immunity raised in this case therefore must begin, not with a rote recitation of the *Harlow* standard, but with an examination of the cause of action that brought the immunity question now before us into play in the first instance.

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[3] "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U. S., at 818. Logically, this reasoning does not extend to cases such as this one in which both the constitutional command and an exception to the rule for conduct that responds to a narrowly defined category of factual situations are clearly established, and the dispute is whether the situation that the officer confronted fits within the category.

As every student of federal jurisdiction quickly learns, the Court in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971), held that Bivens had a cause of action against federal agents "to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment." In addition to finding that no cause of action was available, the District Court in that case had relied on the alternative holding that respondents were immune from liability because of their official position. Because the Court of Appeals for the Second Circuit had not passed on this immunity ruling, we did not consider it. *Id.*, at 397–398. On remand, in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F. 2d 1339, 1348 (1972), the Court of Appeals articulated a dual standard of reasonableness. As an initial matter, the Court rejected the agents' claim under *Barr* v. *Matteo*, 360 U. S. 564 (1959), which had recognized immunity for an official who performs "discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." *Id.*, at 575. The Second Circuit wisely noted that it "would be a sorry state of affairs if an officer had the 'discretion' to enter a dwelling at 6:30 A.M., without a warrant or probable cause . . . ." 456 F. 2d, at 1346. That court nevertheless recognized the need to balance protection of the police from "the demands of every person who manages to escape from the toils of the criminal law" against the "right of citizens to be free from unlawful arrests and searches." *Id.*, at 1347. According to the Second Circuit, the officer "must not be held to act at his peril"; to obtain immunity he "need not allege and prove probable cause in the constitutional sense." *Id.*, at 1348. Instead, an agent should prevail if he could prove "not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable." *Ibid.* Thus, an affirmative defense of reasonable good faith was available *at trial.*[4] In contrast, an immunity claim of the *Harlow* type[5] that would foreclose any trial at all was not available and, in my view, was not appropriate. The strength of the reasonable good-faith defense in any specific case would, of course, vary with the trial evidence about the facts upon which the officer had relied when he made the challenged search or arrest.[6]

As the Court of Appeals recognized, assuring police officers the discretion to act in illegal ways would not be advantageous to society. While executives such as the Attorney General of the United States or a senior assistant to the President of the United States must have the latitude to take action in legally uncharted areas without constant exposure to damages suits, and are therefore entitled to a rule of qualified immunity from many pretrial and trial proceedings, quite different considerations led the Second Circuit to recognize the affirmative defense of reasonable good faith in the *Bivens* case. Today this Court nevertheless makes the fundamental error of simply assuming that *Harlow* immunity is just as appropriate for federal law enforcement officers such as petitioner[7] as it is for high government officials.[8] The doctrinal reach and precedential sweep of this moment of forgetfulness are multiplied because of the interchangeability of immunity precedents between § 1983 suits against state officials and *Bivens* actions against federal officials. Moreover, for the moment restricting my criticism of the Court's analysis to the four corners of the *Harlow* framework, the Court errs by treating a denial of immunity for failure to satisfy the *Harlow* standard as necessarily tantamount to a ruling that the defendants are exposed to damages liability for their every violation of the Fourth Amendment.[9] Such a denial would not necessarily foreclose an affirmative defense based on the Second Circuit's thesis in *Bivens* that an officer may not be liable if his conduct complied with a lesser standard of reasonableness than the constitutional standard which it violated. The Court's failure to recognize that federal agents may retain a partial shield from damages liability, although not necessarily from pretrial and trial proceedings, leads it to the erroneous conclusion that petitioner must have *Harlow* immunity or else none at all save the Fourth Amendment itself.[10]

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[4] Cf. *Gomez* v. *Toledo*, 446 U. S. 635, 640 (1980) (defendant has the burden of pleading good faith as an affirmative defense).

[5] "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U. S., at 818–819 (footnotes omitted).

[6] The Court of Appeals in *Bivens* justified the defense on the basis of the need to protect the officer from the hazards associated with trying to predict whether a court would agree with his assessment that a particular set of facts constituted probable cause. The court explained:

"The numerous dissents, concurrences and reversals, especially in the last decade, indicate that even learned and experienced jurists have had difficulty in defining the rules that govern a determination of probable cause, with or without a warrant. As he tries to find his way in this thicket, the police officer must not be held to act at his peril." *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F. 2d 1339, 1348 (CA2 1972) (citations omitted).

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[7] "Is it not inferable that the point of the remand [to the Court of Appeals in *Bivens*] was to ventilate the question of the possible existence of the kind of qualified privilege the Court of Appeals sustained, rather than the issue of immunity?" P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 1421 (2d ed. 1973).

[8] The Court asserts that this assumption merely reflects our holding last Term in *Malley* v. *Briggs*, 475 U. S., at 340. See *ante*, at 642, n. 4. The *Malley* case, however, rejected a police officer's claim that he was entitled to absolute immunity because he had acted pursuant to an arrest warrant issued by a magistrate. We specifically declined to accept the petitioner's invitation "to expand what was a qualified immunity at common law into an absolute immunity." 475 U. S., at 342. We concluded that in "the case of the officer applying for a warrant" a rule of qualified immunity based on the *Harlow* standard would give "ample room for mistaken judgments." 475 U. S., at 343. Our opinion carefully avoided any comment on warrantless searches or the proper application of *Harlow* in cases in which the claim of "qualified immunity" could not be evaluated in advance of discovery.

In Part III, I explain why the latter alternative is appropriate. For now, I assert the more limited proposition that the Court of Appeals quite correctly rejected Anderson's claim that he is entitled to immunity under *Harlow*. *Harlow* does not speak to the extent, if any, of an official's insulation from monetary liability when the official concedes that the constitutional right he is charged with violating was deeply etched in our jurisprudence, but argues that he reasonably believed that *his* particular actions comported with the constitutional command. In this case the District Judge granted Anderson's motion for summary judgment because she was convinced that the agent had probable cause to enter the Creightons' home and that the absence of a search warrant was justified by exigent circumstances. In other words, the

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[9] "But if the test of 'clearly established law' were to be applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability . . . ." *Ante*, at 639.

[10] The Court does not consider the possibility that the "objective reasonableness" of the officer's conduct may depend on the resolution of a factual dispute. Such a dispute may preclude the entry of summary judgment but, despite the Court's intimation to the contrary, see *ante*, at 640, n. 2, should not necessarily prevent a jury from resolving the factual issues in the officer's favor and thereafter concluding that his conduct was objectively reasonable.

District Judge concluded as a matter of law that there was no substantive constitutional violation. When respondents appealed, petitioner argued that even if the Constitution was violated, he was entitled to immunity because the law defining exigent circumstances was not clearly established when he searched the Creightons' home.[11] In setting aside the order granting summary judgment, the Court of Appeals concluded that many essential factual matters were sharply disputed and that if the Creightons' version of the incident were accepted, there was neither probable cause nor an exigent-circumstances justification for the search. It was therefore necessary to try the case to find out whether the Fourth Amendment had been violated. *Creighton* v. *St. Paul*, 766 F. 2d, at 1277. The Court of Appeals' conclusion that summary judgment on the probable-cause and exigent-circumstances issues was not appropriate in advance of discovery was unquestionably correct.

The Court of Appeals also was correct in rejecting petitioner's argument based on the holding in *Harlow* that the qualified-immunity issue ought to be resolved on a motion for summary judgment before any discovery has taken place. 457 U. S., at 818–819.[12] The Court of Appeals rejected this argument because it was convinced that the rule of law was clear. It also could have rejected the argument on an equally persuasive ground—namely, that the *Harlow* requirement concerning clearly established law applies to *the rule on which the plaintiff relies*, and that there was no doubt about the proposition that a warrantless entry into a home without probable cause is always unlawful.[13] The court does not even reach the exigent-circumstances inquiry unless and until the defendant has shown probable cause and is trying to establish that the search was legal notwithstanding the failure of the police to obtain a warrant. Thus, if we assume that the Court of Appeals was correct in its conclusion that probable cause had not been established, it was also correct in rejecting petitioner's claim to *Harlow* immunity, either because the exigent-circumstances exception to the warrant requirement was clearly established, or because a warrantless entry into a home without probable cause is always unlawful whether or not exigent circumstances are present.

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[11] He also made this argument in District Court. See Memorandum of Points and Authorities 29, 1 Record A–52.

[12] The *Harlow* standard of qualified immunity precludes a plaintiff from alleging the official's malice in order to defeat a qualified-immunity defense. By adopting a purely objective standard, however, *Harlow* may be inapplicable in at least two types of cases. In the first, the plaintiff can only obtain damages if the official's culpable state of mind is established. See, *e. g.*, *Allen* v. *Scribner*, 812 F. 2d 426, 436 (CA9 1987); Note, Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation, 95 Yale L. J. 126, 136–137 (1985). In the second, an official's conduct is not susceptible to a determination that it violated clearly established law because it is regulated by an extremely general and deeply entrenched norm, such as the command of due process or probable cause. The principle is clearly established, but whether it would brand the official's planned conduct as illegal often cannot be ascertained without reference to facts that may be in dispute. See *Reardon* v.

In this Court, Anderson has not argued that any relevant rule of law—whether the probable-cause requirement

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Wroan, 811 F. 2d 1025 (CA7 1987) (police officers denied qualified immunity on summary judgment because their conclusion of probable cause could be found objectively unreasonable when the facts are viewed in light most favorable to the plaintiffs); *Jasinski* v. *Adams*, 781 F. 2d 843 (CA11 1986) *(per curiam)* (federal agent denied qualified immunity on summary judgment because of genuine issue of probable cause); *Deary* v. *Three Un-Named Police Officers*, 746 F. 2d 185 (CA3 1984) (police officers denied qualified immunity on summary judgment because of genuine issue of probable cause).

[13] The Court's opinion reveals little, if any, interest in the facts of this case in which the complaint unquestionably alleged a violation of a clearly established rule of law. Instead, the Court focuses its attention on the hypothetical case in which a complaint drafted by a "passably clever plaintiff" is able to allege a "violation of extremely abstract rights." *Ante*, at 639, and n. 2. I am more concerned with the average citizen who has alleged that law enforcement officers forced their way into his home without a warrant and without probable cause. The constitutional rule allegedly violated in this case is both concrete and clearly established.

or the exigent-circumstances exception to the warrant requirement—was not "clearly established" in November 1983. Rather, he argues that a competent officer might have concluded that the particular set of facts he faced did constitute "probable cause" and "exigent circumstances," and that his own reasonable belief that the conduct engaged in was within the law suffices to establish immunity. But the factual predicate for Anderson's argument is not found in the Creightons' complaint, but rather in the affidavits that he has filed in support of his motion for summary judgment. Obviously, the respondents must be given an opportunity to have discovery to test the accuracy and completeness of the factual basis for the immunity claim. Neither this Court,[14] nor petitioner,[15] disagrees with this proposition. It is therefore pellucidly clear that the Court of Appeals was correct in its conclusion that the record before it did not support the summary judgment.

The Court's decision today represents a departure from the view we expressed two years ago in *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). We held that petitioner was entitled to qualified immunity for authorizing an unconstitutional wiretap because it was not clearly established that warrantless domestic security wiretapping violated the Fourth Amendment. We added in a footnote:

> "We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law." *Id.*, at 535, n. 12.

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[14] See *ante*, at 646–647, n. 6.

[15] See Brief for Petitioner 33–34, n. 18.

Of course, the probable-cause requirement for an officer who faces the situation petitioner did was clearly established. In addition, an officer's belief that his particular warrantless search was justified (by exigent circumstances, in this case) is analytically no different from a situation in which the warrant requirement has not been explicitly held to apply to the particular search undertaken by the officer—the precise situation in which, as the Court recognized in *Mitchell* v. *Forsyth*, there would certainly be no immunity. The good-faith argument advanced by petitioner might support a judgment in his favor after there has been a full examination of the facts, but it is not the kind of claim to immunity, based on the tentativeness or nonexistence of the constitutional rule allegedly violated by the officer, that we accepted in *Harlow* or in *Mitchell*.

III

Although the question does not appear to have been argued in, or decided by, the Court of Appeals, this Court has decided to apply a double standard of reasonableness in damages actions against federal agents who are alleged to have violated an innocent citizen's Fourth Amendment rights. By double standard I mean a standard that affords a law enforcement official two layers of insulation from liability or other adverse consequence, such as suppression of evidence. Having already adopted such a double standard in applying the exclusionary rule to searches authorized by an invalid warrant, *United States* v. *Leon*, 468 U. S. 897 (1984), the Court seems prepared and even anxious in this case to remove any requirement that the officer must obey the Fourth Amendment when entering a private home. I remain convinced that in a suit for damages as well as in a hearing on a motion to suppress evidence, "an official search and seizure cannot be both 'unreasonable' and 'reasonable' at the same time." *Id.*, at 960 (STEVENS, J., dissenting).

A "federal official may not with impunity ignore the limitations which the controlling law has placed on his powers."

Butz v. *Economou*, 438 U. S. 478, 489 (1978). The effect of the Court's (literally unwarranted) extension of qualified immunity, I fear, is that it allows federal agents to ignore the limitations of the probable-cause and warrant requirements with impunity. The Court does so in the name of avoiding interference with legitimate law enforcement activities even though the probable-cause requirement, which limits the police's exercise of coercive authority, is itself a form of immunity that frees them to exercise that power without fear of strict liability. See *Pierson* v. *Ray*, 386 U. S. 547 (1967).

The Court advances four arguments in support of the position that even though an entry into a private home is constitutionally unreasonable, it will not give rise to monetary liability if a reasonable officer could have believed it was reasonable: First, the probable-cause standard is so vague that it is unfair to expect law enforcement officers to comply with it;[16] second, the reasons for not saddling high government officials with the burdens of litigation apply equally to law enforcement officers;[17] third, there is nothing new in the Court's decision today because "we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment," *ante*, at 643, and finally, holding police officers to the constitutional standard of reasonableness would "unduly inhibit officials in the discharge of their duties," *ante*, at 638. None of these arguments on behalf of a double standard of reasonableness is persuasive to me.

Unquestionably, there is, and always has been, some uncertainty in the application of the probable-cause standard to particular cases. It is nevertheless a standard that has survived the test of time both in England and in America. See 2 M. Hale, History of the Pleas of the Crown 150 (1847); J. Jolowicz & T. Lewis, Winfield on Tort 579–580 (8th ed. 1967); Weber, The Birth of Probable Cause, 11 Anglo-Am. L. Rev. 155, 166 (1982). Except in cases in which an officer relies on the fact that a magistrate has issued a warrant, there is no reason to believe that the Court's newly minted standard will provide any more certainty than the constitutional standard. Indeed, it is worth emphasizing that the probable-cause standard itself recognizes the fair leeway that law enforcement officers must have in carrying out their dangerous work. The concept of probable cause leaves room for mistakes, provided always that they are mistakes that could have been made by a reasonable officer. See 1 W. LaFave, Search and Seizure 567 (2d ed. 1987). I find nothing in this Court's new standard that provides the officer with any more guidance than the statement in our opinion in *Brinegar* v. *United States*, 338 U. S. 160 (1949), almost four decades ago:

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[16] "We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Ante*, at 644.

[17] "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Ibid.*

> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.*, at 176.

The suggestion that every law enforcement officer should be given the same measure of immunity as a Cabinet officer or a senior aide to the President of the United States is not compelling. Testifying in court is a routine part of an officer's job; his or her participation in litigation does not occasion nearly as great a disruption of everyday duties as it would with those of a senior government official. Moreover, the political constraints that deter high government officials from violating the Constitution[18] have only slight, if any, application to police officers, and may actually lead to more, rather than less, vigorous enforcement activity. It is thus quite wrong simply to assume that the considerations that justified the decision in *Harlow* v. *Fitzgerald* also justify an equally broad rule of immunity for police officers. As we reasoned in *Scheuer* v. *Rhodes*, 416 U. S. 232, 245-247 (1974):

> "When a court evaluates police conduct relating to an arrest its guideline is 'good faith and probable cause.' . . . In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, or budgets, or of day-to-day decisions—is virtually infinite. . . . [S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad."

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[18] "Intense scrutiny, by the people, by the press, and by Congress, has been the traditional method for deterring violations of the Constitution by these high officers of the Executive Branch. Unless Congress authorizes other remedies, it presumably intends the retributions for any violations to be undertaken by political action. Congress is in the best position to decide whether the incremental deterrence added by a civil damages remedy outweighs the adverse effect that the exposure to personal liability may have on governmental decisionmaking. However the balance is struck, there surely is a national interest in enabling Cabinet officers with responsibilities in this area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell* v. *Forsyth*, 472 U. S. 511, 541 (1985) (STEVENS, J., concurring in judgment).

The Court supports its assertion that we have previously extended qualified immunity to officials who are alleged to have violated the Fourth Amendment, *ante*, at 643, by reference to two cases: *Malley* v. *Briggs*, 475 U. S. 335 (1986), which involved a search pursuant to a warrant, and *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985), in which the plaintiff relied on a rule of law that was not clearly established at the time of the alleged wrong. Neither of these cases supports the proposition that a warrantless search should be evaluated under a standard less strict than the constitutional standard of reasonableness.[19] Despite its protestations to the contrary, the Court makes new law today.

The argument that police officers need special immunity to encourage them to take vigorous enforcement action when they are uncertain about their right to make a forcible entry into a private home has already been accepted in our jurisprudence. We have held that the police act reasonably in entering a house when they have probable cause to believe a fugitive is in the house and exigent circumstances make it impracticable to obtain a warrant. This interpretation of the Fourth Amendment allows room for police intrusion, without a warrant, on the privacy of even innocent citizens. In *Pierson* v. *Ray*, 386 U. S., at 555, we held that police officers would not be liable in an action brought under 42 U. S. C. §1983 "if they acted in good faith and with probable cause . . . ." We explained: "Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. Restatement, Second, Torts § 121 (1965); 1 Harper & James, The Law of Torts § 3.18, at 277–278 (1956); *Ward* v. *Fidelity & Deposit Co. of Maryland*, 179 F. 2d 327 (CA 8th Cir. 1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Ibid.*

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[19] "The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *United States* v. *Leon*, 468 U. S. 897, 924 (1984).

Thus, until now the Court has not found intolerable the use of a probable-cause standard to protect the police officer from exposure to liability simply because his reasonable conduct is subsequently shown to have been mistaken. Today, however, the Court counts the law enforcement interest twice[20] and the individual's privacy interest only once.

The Court's double-counting approach reflects understandable sympathy for the plight of the officer and an overriding interest in unfettered law enforcement. It ascribes a far lesser importance to the privacy interest of innocent citizens than did the Framers of the Fourth Amendment. The importance of that interest and the possible magnitude of its invasion are both illustrated by the facts of this case.[21] The

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[20] "The question whether they had probable cause depends on what they reasonably believed with reference to the facts that confronted them, as the judge instructed in the passage we quoted earlier. To go on and instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that they were acting reasonably is to confuse the jury and give the defendants two bites at the apple." *Llaguno* v. *Mingey*, 763 F. 2d 1560, 1569 (CA7 1985) (Posner, J.) (en banc).

[21] The Court of Appeals described the search of respondents' home in some detail. Its opinion reads, in part, as follows:

"Because the case was dismissed on Anderson's motion for summary judgment, we set out the facts in the light most favorable to the Creightons and draw all inferences from the underlying facts in their favor. *Adickes* v. *Kress & Co.*, 398 U. S. 144, 158–59 . . . (1970). On the night of November 11, 1983, Sarisse and Robert Creighton and their three young daughters were spending a quiet evening at their home when a spotlight suddenly home of an innocent family was invaded by several officers without a warrant, without the owner's consent, with a substantial show of force, and with blunt expressions of disrespect for the law and for the rights of the family members.

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flashed through their front window. Mr. Creighton opened the door and was confronted by several uniformed and plain clothes officers, many of them brandishing shotguns. All of the officers were white; the Creightons are black. Mr. Creighton claims that none of the officers responded when he asked what they wanted. Instead, by his account (as verified by a St. Paul police report), one of the officers told him to 'keep his hands in sight' while the other officers rushed through the door. When Mr. Creighton asked if they had a search warrant, one of the officers told him, 'We don't have a search warrant [and] don't need [one]; you watch too much TV.'

"Mr. Creighton asked the officers to put their guns away because his children were frightened, but the officers refused. Mrs. Creighton awoke to the shrieking of her children, and was confronted by an officer who pointed a shotgun at her. She allegedly observed the officers yelling at her three daughters to 'sit their damn asses down and stop screaming.' She asked the officer, 'What the hell is going on?' The officer allegedly did not explain the situation and simply said to her, 'Why don't you make your damn kids sit on the couch and make them shut up.'

"One of the officers asked Mr. Creighton if he had a red and silver car. As Mr. Creighton led the officers downstairs to his garage, where his maroon Oldsmobile was parked, one of the officers punched him in the face, knocking him to the ground, and causing him to bleed from the mouth and the forehead. Mr. Creighton alleges that he was attempting to move past the officer to open the garage door when the officer panicked and hit him. The officer claims that Mr. Creighton attempted to grab his shotgun, even though Mr. Creighton was not a suspect in any crime and had no contraband in his home or on his person. Shaunda, the Creighton's ten-year-old daughter, witnessed the assault and screamed for her mother to come help. She claims that one of the officers then hit her.

"Mrs. Creighton phoned her mother, but an officer allegedly kicked and grabbed the phone and told her to 'hang up that damn phone.' She told her children to run to their neighbor's house for safety. The children ran out and a plain clothes officer chased them. The Creightons' neighbor allegedly told Mrs. Creighton that the officer ran into her house and grabbed Shaunda by the shoulders and shook her. The neighbor allegedly told the officer, 'Can't you see she's in shock; leave her alone and get out of my house.' Mrs. Creighton's mother later brought Shaunda to the emergency

As the case comes to us, we must assume that the intrusion violated the Fourth Amendment. See *Steagald* v. *United States*, 451 U. S. 204, 211 (1981). Proceeding on that assumption, I see no reason why the family's interest in the security of its own home should be accorded a lesser weight than the Government's interest in carrying out an invasion that was unlawful.[22] Arguably, if the Government considers it important not to discourage such conduct, it should provide indemnity to its officers. Preferably, however, it should furnish the kind of training for its law enforcement agents that would entirely eliminate the necessity for the Court to distinguish between the conduct that a competent officer considers reasonable and the conduct that the Constitution deems rea-

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room at Children's Hospital for an arm injury caused by the officer's rough handling.

"During the melee, family members and friends began arriving at the Creighton's home. Mrs. Creighton claims that she was embarrassed in front of her family and friends by the invasion of their home and their rough treatment as if they were suspects in a major crime. At this time, she again asked Anderson for a search warrant. He allegedly replied, 'I don't need a damn search warrant when I'm looking for a fugitive.' The officers did not discover the allegedly unspecified 'fugitive' at the Creightons' home or any evidence whatsoever that he had been there or that the Creightons were involved in any type of criminal activity. Nonetheless, the officers then arrested and handcuffed Mr. Creighton for obstruction of justice and brought him to the police station where he was jailed overnight, then released without being charged." *Creighton* v. *St. Paul*, 766 F. 2d 1269, 1270–1271 (CA8 1985) (footnote and citation omitted).

[22] Because this case involves the rule that should be applied to the conduct of a law enforcement officer employed by the Federal Government, Justice Jackson's dissenting opinion in *Brinegar* v. *United States*, 338 U. S. 160 (1949), is especially pertinent. He wrote, in part:

"These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Id.*, at 180.

sonable.[23] "Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law." *Butz* v. *Economou*, 438 U. S., at 507. On the other hand, surely an innocent family should not bear the entire risk that a trial court, with the benefit of hindsight, will find that a federal agent reasonably believed that he could break into their home equipped with force and arms but without probable cause or a warrant.

IV

The Court was entirely faithful to the traditions that have been embedded in our law since the adoption of the Bill of Rights when it wrote:

> "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their

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[23] The Court's holding that a federal law enforcement officer is immune if a reasonable officer could have believed that the search was consistent with the Fourth Amendment raises the same difficulties in application as the Court's creation in *United States* v. *Leon* of a good-faith exception to the exclusionary rule when the police officer's reliance on an invalid warrant was objectively reasonable:

"Suppose, for example, that the challenge is to a search and seizure conducted by an FBI agent. The defendant shows that the agent was required to be aware of, and fully aware of, all relevant fourth amendment law. Would the reasonable reliance inquiry turn on whether a particular FBI agent's conduct lived up to the standards expected from someone who was apprised of, or should have been apprised of, relevant fourth amendment law? Or is it enough that the agent's conduct met the lower standard of the average well-trained police officer? . . . If th[e] individualized objective standard is to be the test under *Leon*, then motions to suppress may well require a far greater expenditure of judicial time than the Court seems to think should be devoted to protecting fourth amendment interests." Wasserstrom & Mertens, The Exclusionary Rule on the Scaffold: But Was It A Fair Trial?, 22 Am. Crim. L. Rev. 85, 120 (1984) (footnotes omitted).

> . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' *Silverman* v. *United States*, 365 U. S. 505, 511 [1961]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton* v. *New York*, 445 U. S. 573, 589–590 (1980).[24]

The warrant requirement safeguards this bedrock principle of the Fourth Amendment, while the immunity bestowed on a police officer who acts with probable cause permits him to do his job free of constant fear of monetary liability. The Court rests its doctrinally flawed opinion upon a double standard of reasonableness which unjustifiably and unnecessarily upsets the delicate balance between respect for individual privacy and protection of the public servants who enforce our laws.

I respectfully dissent.

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[24] "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh* v. *Wisconsin*, 466 U. S. 740, 748 (1984) (quoting *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972)).

UNITED STATES ET AL. *v.* STANLEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-393. Argued April 21, 1987—Decided June 25, 1987

Respondent, a serviceman, volunteered for what was ostensibly a chemical warfare testing program, but in which he was secretly administered lysergic acid diethylamide (LSD) pursuant to an Army plan to test the effects of the drug on human subjects, whereby he suffered severe personality changes that led to his discharge and the dissolution of his marriage. Upon being informed by the Army that he had been given LSD, respondent filed a Federal Tort Claims Act (FTCA) suit. The District Court granted the Government summary judgment on the ground that the suit was barred by the doctrine of *Feres* v. *United States*, 340 U. S. 135, which precludes governmental FTCA liability for injuries to servicemen resulting from activity "incident to service." Although agreeing with this holding, the Court of Appeals remanded the case upon concluding that respondent had at least a colorable constitutional claim under the doctrine of *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, whereby a violation of constitutional rights can give rise to a damages action against the offending federal officials even in the absence of a statute authorizing such relief, unless there are "special factors counselling hesitation" or an "explicit congressional declaration" of another, exclusive remedy. Respondent then amended his complaint to add *Bivens* claims and attempted to resurrect his FTCA claim. Although dismissing the latter claim, the District Court refused to dismiss the *Bivens* claims, rejecting, *inter alia*, the Government's argument that the same considerations giving rise to the *Feres* doctrine should constitute "special factors" barring a *Bivens* action. Although it then vacated the portion of its order ruling on the *Bivens* claims, the court subsequently reaffirmed its *Bivens* decision as to the individual federal employee defendants, ruling that *Chappell* v. *Wallace*, 462 U. S. 296, despite its broadly stated holding that servicemen may not maintain damages actions against superior officers for alleged constitutional violations, only bars *Bivens* actions when the claimed wrongs involve direct orders in the performance of military duty and the discipline and order necessary thereto, factors that were not involved here. The court certified its order for interlocutory appeal under 28 U. S. C. § 1292(b), and the Court of Appeals affirmed the ruling on respondent's *Bivens* claims. Although the issue had not been addressed in the District Court's order, the Court of Appeals also ruled that recent precedent indicated that respondent might now have a viable FTCA claim, and therefore remanded.

Held:

1. The Court of Appeals' reinstatement of respondent's FTCA claim was in error, since § 1292(b) authorizes an appeal only from the order certified by the District Court, and not from any other orders that may have been entered in the case. The Court of Appeals' jurisdiction was therefore limited to the order refusing to dismiss respondent's *Bivens* claim. The court's action was particularly erroneous since the United States was not even a party to the appeal, the District Court having previously dismissed respondent's *Bivens* claim against the Government. Pp. 676–678.

2. The Court of Appeals erred in ruling that respondent can proceed with his *Bivens* claims notwithstanding *Chappell*. Respondent's argument that there is no evidence that his injury was "incident to service" is unavailable to him since the issue of service incidence was decided adversely to him by the Court of Appeals' original *Feres* ruling. The argument that the chain-of-command concerns allegedly at the heart of *Chappell* are not implicated here since the defendants were not respondent's superior officers is also unavailing, because the argument ignores *Chappell*'s plain statement that its *Bivens* analysis was guided by *Feres*. Thus, a *Bivens* action should be disallowed whenever the serviceman's injury arises out of activity "incident to service." As in *Chappell*, the "special factors" that counsel against a *Bivens* action in these circumstances are the constitutional authorization for Congress rather than the judiciary to make rules governing the military, the unique disciplinary structure of the Military Establishment, Congress' establishment of a comprehensive internal system of military justice, and the greater degree of disruption respondent's chain-of-command rule would have on the military than does the "incident to service" test. It is irrelevant to a "special factors" analysis whether current laws afford servicemen an "adequate" federal remedy for their injuries. Similarly irrelevant is *Chappell*'s statement that the Court was not there holding that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service, since that statement referred to traditional forms of relief designed to halt or prevent constitutional violations rather than to the award of money damages, a new kind of cause of action. Pp. 678–684.

786 F. 2d 1490, reversed in part, vacated in part, and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined, and in Part I of which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined.

BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, and in Part III of which STEVENS, J., joined, *post*, p. 686. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 708.

Christopher J. Wright argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Ayer, Barbara L. Herwig*, and *Mark W. Pennak.*

Richard A. Kupfer argued the cause and filed a brief for respondent.

JUSTICE SCALIA delivered the opinion of the Court.*

In February 1958, James B. Stanley, a master sergeant in the Army stationed at Fort Knox, Kentucky, volunteered to participate in a program ostensibly designed to test the effectiveness of protective clothing and equipment as defenses against chemical warfare. He was released from his then-current duties and went to the Army's Chemical Warfare Laboratories at the Aberdeen Proving Grounds in Maryland. Four times that month, Stanley was secretly administered doses of lysergic acid diethylamide (LSD), pursuant to an Army plan to study the effects of the drug on human subjects. According to his Second Amended Complaint (the allegations of which we accept for purposes of this decision), as a result of the LSD exposure, Stanley has suffered from hallucinations and periods of incoherence and memory loss, was impaired in his military performance, and would on occasion "awake from sleep at night and, without reason, violently beat his wife and children, later being unable to recall the entire incident." App. 5. He was discharged from the Army in 1969. One year later, his marriage dissolved because of the personality changes wrought by the LSD.

On December 10, 1975, the Army sent Stanley a letter soliciting his cooperation in a study of the long-term effects of LSD on "volunteers who participated" in the 1958 tests.

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*JUSTICE STEVENS joins Part I of this opinion.

This was the Government's first notification to Stanley that he had been given LSD during his time in Maryland. After an administrative claim for compensation was denied by the Army, Stanley filed suit under the Federal Tort Claims Act (FTCA), 28 U. S. C. § 2671 *et seq.*, alleging negligence in the administration, supervision, and subsequent monitoring of the drug testing program.

The District Court granted the Government's motion for summary judgment, finding that Stanley "was at all times on active duty and participating in a bona fide Army program during the time the alleged negligence occurred," No. 78-8141-Civ-CF, p. 2 (SD Fla., May 14, 1979), and that his FTCA suit was therefore barred by the doctrine of *Feres* v. *United States*, 340 U. S. 135 (1950), which determined that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.*, at 146. The Court of Appeals for the Fifth Circuit agreed that the *Feres* doctrine barred Stanley's FTCA suit against the United States, but held that the District Court should have dismissed for lack of subject-matter jurisdiction rather than disposing of the case on the merits. *Stanley* v. *CIA*, 639 F. 2d 1146 (1981). The Government contended that a remand would be futile, because *Feres* would bar any claims that Stanley could raise either under the FTCA or directly under the Constitution against individual officers under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The court concluded, however, that Stanley "has at least a colorable constitutional claim based on *Bivens*," 639 F. 2d, at 1159, and remanded "for the consideration of the trial court of any amendment which the appellant may offer, seeking to cure the jurisdictional defect." *Id.*, at 1159-1160.

Stanley then amended his complaint to add claims against unknown individual federal officers for violation of his constitutional rights. He also specifically alleged that the United States' failure to warn, monitor, or treat him after he was discharged constituted a separate tort which, because occurring subsequent to his discharge, was not "incident to service" within the *Feres* exception to the FTCA. See *United States* v. *Brown*, 348 U. S. 110 (1954). The District Court dismissed the FTCA claim because the alleged negligence was not "separate and distinct from any acts occurring before discharge, so as to give rise to a separate actionable tort not barred by the *Feres* doctrine." 549 F. Supp. 327, 329 (SD Fla. 1982). It refused, however, to dismiss the *Bivens* claims. The court rejected, *inter alia*, the Government's argument that the same considerations giving rise to the *Feres* exception to the FTCA should constitute "special factors" of the sort alluded to in *Bivens*, *supra*, at 396, and other cases as bars to a *Bivens* action. It cited as sole authority for that rejection the Court of Appeals for the Ninth Circuit's decision in *Wallace* v. *Chappell*, 661 F. 2d 729 (1981). *Sua sponte*, the court certified its order for interlocutory appeal under 28 U. S. C. § 1292(b).

Following issuance of the order, the Government moved for partial final judgment pursuant to Federal Rule of Civil Procedure 54(b)[1] on behalf of itself and three federal agencies that had (improperly) been named as FTCA defendants throughout the proceedings. The Government also argued that because no individual defendants had been named or served, and thus had neither appeared as parties nor sought representation from the Department of Justice, there was no one to seek interlocutory review of the court's refusal to dismiss the *Bivens* actions. The court concluded that the Government's contentions were "well taken," *Stanley* v. *CIA*, 552 F. Supp. 619 (SD Fla. 1982), and on November 9, 1982, it granted the motion for partial final judgment, ordered the

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[1] "When more than one claim for relief is presented . . . , the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Clerk to "enter final judgment in favor of the United States forthwith," *ibid.*, and vacated the portion of its prior order ruling on the *Bivens* claims against the individual defendants, giving Stanley 90 days to serve at least one individual defendant. The docket sheet for the case reflects the terms of that order ("The clerk to enter final judgment in favor of USA," App. to Brief in Opposition A4), but does not indicate that an additional "separate document," Fed. Rule Civ. Proc. 58, containing the judgment was entered. See Fed. Rule Civ. Proc. 79(a).

Stanley then filed his Second Amended Complaint, naming as defendants nine individuals (seven of whom are before us as petitioners) and the Board of Regents of the University of Maryland,[2] and asserting civil rights claims under 42 U. S. C. §§1983 and 1985. Motions to dismiss for lack of personal jurisdiction and improper venue were filed on behalf of some of the defendants (it was alleged that proper service had not been made on the others), but before those motions were ruled on, we issued our decision in *Chappell* v. *Wallace*, 462 U. S. 296 (1983), holding that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations," *id.*, at 305, and reversing the sole authority cited by the District Court in its prior order refusing to dismiss Stanley's *Bivens* claims. Stanley's counsel brought the *Chappell* decision to the attention of the District Court, which, apparently treating the filing of the Second Amended Complaint as automatically reinstating its previously vacated order concerning the *Bivens* claims, *sua sponte* reconsidered and reaffirmed its prior decision. It concluded that, despite the broadly stated holding of the case, *Chappell* did not "totally ba[r] *Bivens* actions by servicemen for torts committed against them during their term of service." 574 F. Supp. 474, 478 (1983). Rather, it said, *Chappell* only bars *Bivens* actions when "a member of the military brings a suit against a superior officer for wrongs which involve direct orders in the performance of military duty and the discipline and order necessary thereto," 574 F. Supp., at 479, factors that in its view were not involved in Stanley's claim. Nor could the court find in congressionally prescribed remedies, such as the Veterans' Benefits Act, 38 U. S. C. § 301 *et seq.*, any expression of exclusivity of the sort *Bivens* contemplated would preclude recovery. See 403 U. S., at 397. The court again certified its order for interlocutory appeal under § 1292(b), which petitioners sought and the Court of Appeals for the Eleventh Circuit granted.

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[2] The named defendants are Joseph R. Bertino, M. D.; Board of Regents of the University of Maryland; H. D. Collier; Albert Dreisbach; Bernard G. Elfert; Sidney Gottlieb, M. D.; Richard Helms; Gerald Klee, M. D.; Van Sim, M. D.; Walter Weintraub, M. D.; and unknown individual federal and state agents and officers. Klee and Weintraub, who are not parties to this appeal, were employees of the University of Maryland in 1958; the rest of the individual defendants, petitioners in this action, are alleged to have been federal employees or agents involved at some point in the drug testing program or followup. Stanley claims that these names first became available to him from the record in *Sweet* v. *United States*, 687 F. 2d 246 (CA8 1982), a case raising nearly identical claims.

The Court of Appeals affirmed the conclusion that *Chappell* does not require dismissal of Stanley's *Bivens* claims, on essentially the grounds relied upon by the District Court. 786 F. 2d 1490 (1986). The court did not think that Congress' activity in the military justice field was a "special facto[r]" precluding Stanley's claim, as "[t]hose intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* are clearly inadequate to compensate Stanley for the violations complained of here." *Id.*, at 1496.

Although the issue had not been addressed in the order from which the interlocutory appeal was taken, the Court of Appeals further determined that recent precedent in the Eleventh Circuit, including *Johnson* v. *United States*, 749 F. 2d 1530 (1985), rev'd, 481 U. S. 681 (1987), indicated that Stanley might have a viable FTCA claim against the United States, and that law-of-the-case principles therefore did not require adherence to the 1982 holding that Stanley's FTCA claim was barred by *Feres*. It remanded with instructions to the District Court to "allow Stanley the opportunity to amend to plead consistent with recent precedent." 786 F. 2d, at 1499.

Because the Courts of Appeals have not been uniform in their interpretation of the holding in *Chappell*,[3] and because the Court of Appeals' reinstatement of Stanley's FTCA claims seems at odds with sound judicial practice, we granted certiorari. 479 U. S. 1005 (1986).

I

We first address the Court of Appeals' instruction to the District Court to allow Stanley to replead his FTCA claim. While petitioners advance several reasons why that action was improper, and additional reasons can perhaps be found in our recent decision in *United States* v. *Johnson*, 481 U. S. 681 (1987), we find it necessary to discuss only one. The case did not come before the Court of Appeals on appeal from a final decision of the District Court under 28 U. S. C. § 1291. Rather, the Court of Appeals had jurisdiction pursuant to § 1292(b), which provides:

> "When a district judge in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that *such order* involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal *from the order* may materially advance the ultimate termination of the litigation, he shall so state in writing in

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[3] See *Jorden* v. *National Guard Bureau*, 799 F. 2d 99, 107–108 (CA3 1986) (§ 1983); *Trerice* v. *Summons*, 755 F. 2d 1081, 1082–1084 (CA4 1985); *Mollnow* v. *Carlton*, 716 F. 2d 627, 629–630 (CA9 1983), cert. denied, 465 U. S. 1100 (1984); *Gaspard* v. *United States*, 713 F. 2d 1097, 1103–1104 (CA5 1983), cert. denied *sub nom. Sheehan* v. *United States*, 466 U. S. 975 (1984).

> such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken *from such order* . . . ." (Emphasis added.)

An appeal under this statute is from the *certified order*, not from any other orders that may have been entered in the case. Even if the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court (because the statute brings the "order," not the question, before the court), that jurisdiction *is* confined to the particular order appealed from. Commentators and courts have consistently observed that "the scope of the issues open to the court of appeals is closely limited to the order appealed from [and] [t]he court of appeals will not consider matters that were ruled upon in other orders." 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure §3929, p. 143 (1977). See *Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F. 2d 277, 281, n. 3 (CA8 1984), cert. dism'd, 472 U. S. 1022 (1985); *United States* v. *Bear Marine Services*, 696 F. 2d 1117, 1119, n. 1 (CA5 1983); *Time, Inc.* v. *Ragano*, 427 F. 2d 219, 221 (CA5 1970).

Here, the "order appealed from" was an order refusing to dismiss Stanley's *Bivens* claims on the basis of our holding in *Chappell*. The Court of Appeals therefore had no jurisdiction to enter orders relating to Stanley's long-dismissed FTCA claims, whether or not, as Stanley argues, "the issues involved in the *Bivens* claim and the alleged immunity of the individual defendants closely parallels *[sic]* the government's immunity due to the *Feres* doctrine . . . [and] that is what all parties were arguing about in the interlocutory appeal." Brief for Respondent 17–18. The Court of Appeals' action is particularly astonishing in light of the fact that the United States was not even a party to the appeal, which involved only Stanley and the individual *Bivens* defendants (Stanley's *Bivens* claim against the United States having been dismissed by the District Court in 1982). We vacate that portion of the Court of Appeals' judgment.[4]

II

That leaves the Court of Appeals' ruling that Stanley can proceed with his *Bivens* claims notwithstanding the decision in *Chappell*. In our view, the court took an unduly narrow view of the circumstances in which courts should decline to permit nonstatutory damages actions for injuries arising out of military service.

In *Bivens*, we held that a search and seizure that violates the Fourth Amendment can give rise to an action for damages against the offending federal officials even in the absence of a statute authorizing such relief. We suggested in dictum that inferring such an action directly from the Constitution might not be appropriate when there are "special factors counselling hesitation in the absence of affirmative action by Congress," 403 U. S., at 396, or where there is an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.*, at 397. We subsequently held that actions for damages could be brought directly under the Due Process Clause of the Fifth Amendment, *Davis* v. *Passman*, 442 U. S. 228 (1979), and under the Eighth Amendment's proscription against cruel and unusual punishment, *Carlson* v. *Green*, 446 U. S. 14 (1980), repeating each time the dictum that "special factors counselling hesitation" or an "explicit congressional declaration" that another remedy is exclusive would bar such an action. 442 U. S., at 246–247; 446 U. S., at 18–19. In *Chappell* (and in *Bush* v. *Lucas*, 462 U. S. 367

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[4] For the same reasons, however, it was proper for the Court of Appeals to decline to rule on the civil rights claims against Klee, Weintraub, and the University of Maryland Board of Regents, which were not addressed in the District Court's order. We similarly decline the Government's invitation, Brief for Petitioners 25, n. 17, to rule on those claims.

(1983), decided the same day), that dictum became holding. *Chappell* reversed a determination that no "special factors" barred a constitutional damages remedy on behalf of minority servicemen who alleged that because of their race their superior officers "failed to assign them desirable duties, threatened them, gave them low performance evaluations, and imposed penalties of unusual severity." 462 U. S., at 297. We found "factors counselling hesitation" in "[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice . . . ." *Id.*, at 300. We observed that the Constitution explicitly conferred upon Congress the power, *inter alia*, "[t]o make Rules for the Government and Regulation of the land and naval Forces," U. S. Const. Art. I, § 8, cl. 14, thus showing that "the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment . . . ." 462 U. S., at 301. Congress, we noted, had exercised that authority to "establis[h] a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." *Id.*, at 302. We concluded that "[t]aken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Id.*, at 304.

Stanley seeks to distance himself from this holding in several ways. First, he argues that the defendants in this case were not Stanley's superior military officers, and indeed may well have been civilian personnel, and that the chain-of-command concerns at the heart of *Chappell* and cases such as *Gaspard* v. *United States*, 713 F. 2d 1097, 1103–1104 (CA5 1983) (plaintiff was ordered to expose himself to radiation from nuclear test), cert. denied *sub nom. Sheehan* v. *United States*, 466 U. S. 975 (1984), are thus not implicated. Second, Stanley argues that there is no evidence that this injury was "incident to service," because we do not know the precise character of the drug testing program, the titles and roles of the various individual defendants, or Stanley's duty status when he was at the Maryland testing grounds. If that argument is sound, then even if *Feres* principles apply fully to *Bivens* actions, further proceedings are necessary to determine whether they apply to this case.

The second argument, however, is not available to Stanley here. The issue of service incidence, as that term is used in *Feres*, was decided adversely to him by the Court of Appeals in 1981, 639 F. 2d, at 1150–1153, and there is no warrant for reexamining that ruling here. See *Allen* v. *McCurry*, 449 U. S. 90, 94 (1980). As for his first argument, Stanley and the lower courts may well be correct that *Chappell* implicated military chain-of-command concerns more directly than do the facts alleged here; in the posture of this case, one must assume that at least some of the defendants were not Stanley's superior officers, and that he was not acting under orders from superior officers when he was administered LSD. It is therefore true that *Chappell* is not strictly controlling, in the sense that no holding can be broader than the facts before the court. It is even true that some of the language of *Chappell*, explicitly focusing on the officer-subordinate relationship that existed in the case at hand, would not be applicable here. To give controlling weight to those facts, however, is to ignore our plain statement in *Chappell* that "[t]he 'special factors' that bear on the propriety of respondents' *Bivens* action also formed the basis of this Court's decision in *Feres* v. *United States*," 462 U. S., at 298, and that "[a]lthough this case concerns the limitations on the type of nonstatutory damages remedy recognized in *Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* guides our analysis in this case." *Id.*, at 299. Since *Feres* did not consider the officer-subordinate relationship crucial, but established instead an "incident to service" test, it is plain that our reasoning in *Chappell* does not support the distinction Stanley would rely on.

As we implicitly recognized in *Chappell*, there are varying levels of generality at which one may apply "special factors" analysis. Most narrowly, one might require reason to believe that in the particular case the disciplinary structure of the military would be affected—thus not even excluding *all* officer-subordinate suits, but allowing, for example, suits for officer conduct so egregious that no responsible officer would feel exposed to suit in the performance of his duties. Somewhat more broadly, one might disallow *Bivens* actions whenever an officer-subordinate relationship underlies the suit. More broadly still, one might disallow them in the officer-subordinate situation and also beyond that situation when it affirmatively appears that military discipline would be affected. (This seems to be the position urged by Stanley.) Fourth, as we think appropriate, one might disallow *Bivens* actions whenever the injury arises out of activity "incident to service." And finally, one might conceivably disallow them by servicemen entirely. Where one locates the rule along this spectrum depends upon how prophylactic one thinks the prohibition should be (*i. e.*, how much occasional, unintended impairment of military discipline one is willing to tolerate), which in turn depends upon how harmful and inappropriate judicial intrusion upon military discipline is thought to be. This is essentially a policy judgment, and there is no scientific or analytic demonstration of the right answer. Today, no more than when we wrote *Chappell*, do we see any reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits, where we adopted an "incident to service" rule. In fact, if anything we might have felt freer to compromise military concerns in the latter context, since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified; whereas here we are confronted with an explicit constitutional authorization for *Congress* "[t]o make Rules for the Government and Regulation of the land and naval Forces," U. S. Const., Art. I, § 8, cl. 14, and rely upon inference for our own authority to allow money damages.[5] This is not to say, as JUSTICE BRENNAN's dissent characterizes it, *post*, at 707, that all matters within congressional power are exempt from *Bivens*. What is distinctive here is the specificity of that technically superfluous grant of power,[6] and the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches. All this counsels hesitation in our creation of damages remedies in this field.

The other major factor determining at which point, along the spectrum of generality, one should apply *Chappell's* "special factors" analysis consists of the degree of disruption which each of them will in fact produce. This is an analytic rather than a policy judgment—but once again we see no reason why it should differ in the *Bivens* and the *Feres* contexts. Stanley underestimates the degree of disruption that would be caused by the rule he proposes. A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime. The "incident to service" test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.

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[5] This distinction also explains why the author of this opinion, who dissented in *United States* v. *Johnson*, 481 U. S. 681 (1987), because he saw no justification for adopting a military affairs exception to the FTCA, see *id.*, at 692, believes that consideration of such an exception to *Bivens* liability is appropriate. And if exception is to be made, there is, as *Chappell* recognized, no reason for it to be narrower under *Bivens* than under the FTCA.

[6] Had the power to make rules for the military not been spelled out, it would in any event have been provided by the Necessary and Proper Clause, U. S. Const, Art. I, § 8, cl. 18—as is, for example, the power to make rules for the government and regulation of the Postal Service.

Contrary to the view of the Court of Appeals, 786 F. 2d, at 1496, it is irrelevant to a "special factors" analysis whether the laws currently on the books afford Stanley, or any other particular serviceman, an "adequate" federal remedy for his injuries. The "special facto[r]" that "counsel[s] hesitation" is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate. Similarly irrelevant is the statement in *Chappell*, erroneously relied upon by Stanley and the lower courts, that we have "never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." 462 U. S., at 304. As the citations immediately following that statement suggest, it referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages. See *Brown* v. *Glines*, 444 U. S. 348 (1980); *Parker* v. *Levy*, 417 U. S. 733 (1974); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). Such suits, like the case of *Wilkes* v. *Dinsman*, 7 How. 89 (1849), distinguished in *Chappell*, 462 U. S., at 305, n. 2, sought traditional forms of relief, and "did not ask the Court to imply a new kind of cause of action." *Ibid.*

We therefore reaffirm the reasoning of *Chappell* that the "special factors counselling hesitation"—"the unique disciplinary structure of the Military Establishment and Congress' activity in the field," *id.*, at 304—extend beyond the situation in which an officer-subordinate relationship exists, and require abstention in the inferring of *Bivens* actions as extensive as the exception to the FTCA established by *Feres* and *United States* v. *Johnson*. We hold that no *Bivens* remedy is available for injuries that "arise out of or are in the course of activity incident to service." 340 U. S., at 146.

Part II of JUSTICE BRENNAN's opinion argues in essence that because the refusal to entertain a *Bivens* action has the same effect as a grant of unqualified immunity, we should find "special factors" sufficient to preclude a *Bivens* action only when our immunity decisions would absolutely foreclose a money judgment against the defendant officials. The short answer to this argument is that *Chappell* made no reference to immunity principles, and *Bivens* itself explicitly distinguished the question of immunity from the question whether the Constitution directly provides the basis for a damages action against individual officers. 403 U. S., at 397. The analytic answer is that the availability of a damages action under the Constitution for particular *injuries* (those incurred in the course of military service) is a question logically distinct from immunity to such an action on the part of particular *defendants*. When liability is asserted under a statute, for example, no one would suggest that whether a cause of action exists should be determined by consulting the scope of common-law immunity enjoyed by actors in the area to which the statute pertains. Rather, one applies that immunity (unless the statute says otherwise) *to* whatever actions and remedies the terms of the statute are found to provide. Similarly, the *Bivens* inquiry in this case—whether a damages action for injury in the course of military service can be founded directly upon the Constitution—is analytically distinct from the question of official immunity from *Bivens* liability.

We do not understand JUSTICE BRENNAN to dispute this. Rather, he argues that the answer to the former inquiry should be such that it produces a result coextensive with the answer to the latter. That is of course quite possible to achieve, since one can adjust the definition of a cause of action to produce precisely the same results as a given definition of immunity. For example, if a State wanted to eliminate driver liability for automobile accidents, it could *either* prescribe that all automobile drivers are immune from suit for injuries caused by their negligent driving *or* prescribe that no cause of action exists for injuries caused by negligent driving. But what JUSTICE BRENNAN fails to produce is any *reason* for creating such an equivalency in the present case (and, presumably, in all *Bivens* actions). In the sole case he relies upon for his novel analysis, *Davis* v. *Passman*, 442 U. S. 228 (1979), there was a reason. There the Constitution itself contained an applicable immunity provision—the Speech or Debate Clause, Art. I, § 6, cl. 1—which rendered Members of Congress immune from suit for their legislative activity. The Court held that the "special concerns counseling hesitation" in the inference of *Bivens* actions in that area "are coextensive with the protections afforded by the Speech or Debate Clause." 442 U. S., at 246. That is to say, the Framers addressed the special concerns in that field through an immunity provision—and had they believed further protection was necessary they would have expanded that immunity provision. It would therefore have distorted their plan to achieve the same effect as more expansive immunity by the device of denying a cause of action for injuries caused by Members of Congress where the constitutionally prescribed immunity does not apply.

Thus, *Davis* v. *Passman* would be relevant here if the Constitution contained a grant of immunity to military personnel similar to the Speech or Debate Clause. It does not, of course, and so we are compelled in the military field, as in others, to make our own assessment of whether, given the "special concerns counseling hesitation," *Bivens* actions will lie. There is no more reason why court-created rules of immunity (as opposed to immunity specifically prescribed in the Constitution) should be held *a priori* to describe the limit of those concerns here than in any other field. Thus, the rule

JUSTICE BRENNAN proposes is not an application but a repudiation of the "special factors" limitation upon the inference of *Bivens* actions. That limitation is quite hollow if it does nothing but duplicate pre-existing immunity from suit.

For the foregoing reasons, we vacate the Court of Appeals' judgment that Stanley can assert an FTCA claim on remand to the District Court and reverse its judgment refusing to dismiss the *Bivens* claims against petitioners. The judgment of the Court of Appeals is reversed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE STEVENS joins as to Part III, concurring in part and dissenting in part.

In experiments designed to test the effects of lysergic acid diethylamide (LSD), the Government of the United States treated thousands of its citizens as though they were laboratory animals, dosing them with this dangerous drug without their consent. One of the victims, James B. Stanley, seeks compensation from the Government officials who injured him. The Court holds that the Constitution provides him with no remedy, solely because his injuries were inflicted while he performed his duties in the Nation's Armed Forces. If our Constitution required this result, the Court's decision, though legally necessary, would expose a tragic flaw in that document. But in reality, the Court disregards the commands of our Constitution, and bows instead to the purported requirements of a different master, *military discipline*, declining to provide Stanley with a remedy because it finds "special factors counselling hesitation." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 396 (1971). This is abdication, not hesitation. I dissent.[1]

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[1] I agree with the Court that Stanley's cause of action under the Federal Tort Claims Act (FTCA) should not have been reinstated by the Court of Appeals. Thus, I join in Part I of the Court's opinion.

I

Before addressing the legal questions presented, it is important to place the Government's conduct in historical context. The medical trials at Nuremberg in 1947 deeply impressed upon the world that experimentation with unknowing human subjects is morally and legally unacceptable. The United States Military Tribunal established the Nuremberg Code as a standard against which to judge German scientists who experimented with human subjects. Its first principle was:

> "1. *The voluntary consent of the human subject is absolutely essential.*
>
> . . . . .
>
> "The duty and responsibility for ascertaining the quality of the consent rests upon *each individual* who initiates, directs or engages in the experiment. *It is a personal duty and responsibility which may not be delegated to another with impunity.*" *United States* v. *Brandt* (The Medical Case), 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, pp. 181–182 (1949) (emphasis added).

The United States military developed the Code, which applies to all citizens—soldiers as well as civilians.[2]

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[2] See, *e. g.*, Mulford, Experimentation on Human Beings, 20 Stan. L. Rev. 99, 105, n. 34 (1967) (Military personnel cannot be compelled to submit to nontherapeutic procedures) (citing Johnson, Civil Rights of Military Personnel Regarding Medical Care and Experimental Procedures, 117 Science 212–215 (1953)). Indeed, the application of such principles to all citizens, including soldiers, is essential in a society governed by law:

"[Human experimentation authorized by the state] dramatizes the notion that the state is free to treat its nationals in the manner it chooses because it perceives itself as the source of all rights, and therefore as beyond the reach of law, rather than regarding rights as inalienable, that is, not subject to arbitrary cancellation by the State." Bassiouni, Baffes, & Evrard, An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation, 72 J. of Crim. L. & C. 1597, 1607 (1981).

In the 1950's, in defiance of this principle, military intelligence agencies and the Central Intelligence Agency (CIA) began surreptitiously testing chemical and biological materials, including LSD. These programs, which were "designed to determine the potential effects of chemical or biological agents when used operationally against individuals unaware that they had received a drug," included drug testing on "unwitting, nonvolunteer" Americans. S. Rep. No. 94-755, Book I, p. 385 (1976) (S. Rep.).[3] James B. Stanley, a master sergeant in the Army, alleges that he was one of 1,000 soldiers covertly administered LSD by Army Intelligence between 1955 and 1958. See *id.*, at 392.[4]

The Army recognized the moral and legal implications of its conduct. In a 1959 Staff Study, the United States Army Intelligence Corps (USAINTC) discussed its covert administration of LSD to soldiers:

> "'It was always a tenet of Army Intelligence that the basic American principle of dignity and welfare of the individual will not be violated. . . . In intelligence, the stakes involved and the interests of national security may permit a more tolerant interpretation of moral-ethical values, but not legal limits, through necessity. . . . Any claim against the US Government for alleged injury due

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[3] This massive Senate Report is the product of a select Committee which "conduct[ed] an investigation and study of governmental operations with respect to intelligence activities and of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government." S. Rep., at 2. The Committee's function was "to illustrate the problems before Congress and the country." *Id.*, at 5. Significantly, the Report added that "[t]he Justice Department and the courts in turn have their proper roles to play." *Ibid.*

[4] The intelligence community believed that it was necessary "to conceal these activities from the American public in general," because public knowledge of the "unethical and illicit activities would have serious repercussions in political and diplomatic circles and would be detrimental to the accomplishment of its mission." *Id.*, at 394 (quoting CIA Inspector General's Survey of the Technical Services Division, p. 217 (1957)).

> to EA 1729 [LSD] must be legally shown to have been due to the material. Proper security and appropriate operational techniques can protect the fact of employment of EA 1729.'" *Id.*, at 416–417 (quoting USAINTC Staff Study, Material Testing Program EA 1729, p. 26 (Oct. 15, 1959)).

That is, legal liability could be avoided by covering up the LSD experiments.

When the experiments were uncovered, the Senate agreed with the Army's conclusion that its experiments were of questionable legality, and issued a strong condemnation:

> "[I]n the Army's tests, as with those of the CIA, individual rights were . . . subordinated to national security considerations; informed consent and follow-up examinations of subjects were neglected in efforts to maintain the secrecy of the tests. Finally, the command and control problems which were apparent in the CIA's programs are paralleled by a lack of clear authorization and supervision in the Army's programs." S. Rep., at 411.[5]

Having invoked national security to conceal its actions, the Government now argues that the preservation of military discipline requires that Government officials remain free to violate the constitutional rights of soldiers without fear of money damages. What this case and others like it demonstrate, however, is that Government officials (military or civilian) must not be left with such freedom. See, *e. g.*, *Jaffee* v. *United States*, 663 F. 2d 1226 (CA3 1981) (en banc) (exposure of soldiers to nuclear radiation during atomic weapons testing); *Schnurman* v. *United States*, 490 F. Supp. 429 (ED

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[5] See also S. Rep., at 403:

"Though it was known that the testing was dangerous, the lives of subjects were placed in jeopardy and their rights were ignored during the ten years of testing which followed Dr. Olsen's death. [Dr. Olsen, a civilian employee of the Army, committed suicide after being administered LSD without his knowledge.] Although it was clear that the laws of the United States were being violated, the testing continued."

Va. 1980) (exposure of unknowing soldier to mustard gas); *Thornwell* v. *United States*, 471 F. Supp. 344 (DC 1979) (soldiers used to test the effects of LSD without their knowledge); cf. *Barrett* v. *United States*, No. 76 Civ. 381 (SDNY, May 5, 1987) (death of mental hospital patient used as the unconsenting subject of an Army experiment to test mescaline derivative).[6]

II

Serious violations of the constitutional rights of soldiers must be exposed and punished. Of course, experimentation with unconsenting soldiers, like any constitutional violation, may be enjoined *if* and when discovered. An injunction, however, comes too late for those already injured; for these victims, "it is damages or nothing." *Bivens*, 403 U. S., at 410 (Harlan, J., concurring). The solution for Stanley and other soldiers, as for any citizen, lies in a *Bivens* action—an action for damages brought directly under the Constitution for the violation of constitutional rights by federal officials. But the Court today holds that no *Bivens* remedy is available for service-connected injuries, because "special factors counse[l] hesitation." *Id.*, at 396. The practical result of this decision is absolute immunity from liability for money damages for all federal officials who intentionally violate the constitutional rights of those serving in the military.

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[6] In *Jaffee* v. *United States*, 663 F. 2d 1226 (CA3 1981), a former enlisted member of the Army sought damages arising from injuries received in 1953 at Camp Desert Rock, Nevada, where his commanding officers ordered him and thousands of other soldiers to stand unprotected from nuclear radiation while an atomic bomb was exploded nearby. Jaffee developed inoperable cancer in 1977 and alleged that the radiation exposure was the cause.

Between 1945 and 1963, an estimated 250,000 military personnel were exposed to large doses of radiation while engaged in maneuvers designed to determine the effectiveness of combat troops in nuclear battlefield conditions. Veterans' Claims for Disabilities from Nuclear Weapons Testing: Hearing before the Senate Committee on Veterans Affairs, 96th Cong., 1st Sess., 2 (1979). Soldiers were typically positioned one to three miles from nuclear detonation. They were issued no protective clothing (although Atomic Energy Commission personnel were) and were not warned as to the possible dangers of radiation. They were instructed to cover their eyes at detonation; "soldiers with their eyes shut could see the bones in their forearms at the moment of the explosion." Schwartz, Making Intramilitary Tort Law More Civil: A Proposed Reform of the *Feres* Doctrine, 95 Yale L. J. 992, 994, n. 16 (1986) (discussing firsthand accounts in T. Saffer & O. Kelly, Countdown Zero 43, 75, 152 (1982)). The exposed servicemembers have been disproportionately likely to be afflicted with inoperable cancer and leukemia, as well as a number of nonmalignant disorders.

First, I will demonstrate that the Court has reached this result only by ignoring governing precedent. The Court confers absolute immunity from money damages on federal officials (military and civilian alike) without consideration of longstanding case law establishing the general rule that such officials *are* liable for damages caused by their intentional violations of well-established constitutional rights. If applied here, that rule would require a different result. Then I will show that the Court denies Stanley's *Bivens* action solely on the basis of an unwarranted extension of the narrow exception to this rule created in *Chappell* v. *Wallace*, 462 U. S. 296 (1983). The Court's reading of *Chappell* tears it from its analytical moorings, ignores the considerations decisive in our immunity cases, and leads to an unjust and illogical result.

A

The Court acknowledges that Stanley may bring a *Bivens* action for damages under the Constitution unless there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, *supra*, at 396. Ascertaining the propriety of a damages award is the purpose of both the *Bivens* "special factors" analysis and the inquiry into whether these federal officials are entitled to absolute immunity from money damages.[7] As a practical matter, the immunity inquiry and the "special factors" inquiry are the same; the policy considerations that inform them are identical, and a court can examine these considerations only once.[8]

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[7] The Court made clear in *Davis* v. *Passman*, 442 U. S. 228, 244 (1979), that the question whether a plaintiff has a cause of action under the Constitution is different from the question whether that plaintiff is entitled to

In *Davis* v. *Passman*, 442 U. S. 228 (1979), the Court explicitly acknowledged that the immunity question and the "special factors" question are intertwined. The Court recognized that "a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation" under *Bivens*, but held that "these concerns are coextensive with the protections afforded by the Speech or Debate Clause," *id.*, at 246, which "shields federal legislators with absolute immunity," *id.*, at 236, n. 11.[9] Absent immunity, the Court said, legislators ought to be liable in damages, as are ordinary persons. See *id.*, at 246. The same analysis applies to federal officials making decisions in military matters. Absent immunity, they are liable for damages, as are all citizens.

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damages if he or she prevails on the merits. The latter is the relevant inquiry when a *Bivens* claim is made. Of course, if the plaintiff fails either to plead a cause of action or to demonstrate the damages are appropriate as a matter of law, the complaint is dismissed under Federal Rule of Civil Procedure 12(b)(6). In the first instance, the complaint is dismissed for "failure to state a claim," while in the latter instance, the complaint is dismissed because it is not one "upon which relief can be granted."

[8] The Court has acknowledged that the damages remedy made available in *Bivens* would be "drained of meaning if federal officials were entitled to absolute immunity for their constitutional transgressions," because "a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs." *Butz* v. *Economou*, 438 U. S. 478, 501, 505 (1978) (internal quotation omitted).

[9] The Court in *Davis*, *supra*, did not decide whether Passman was absolutely immune from damages, but instead remanded the action to the Court of Appeals for a determination of that question. Analytically, the Court therefore postponed decision on the propriety of damages until a lower court could ascertain whether immunity, a "special factor," shielded Passman from damages.

As the Court notes, I do not dispute that the question whether a *Bivens* action exists is "analytically distinct from the question of official immunity from *Bivens* liability." *Ante*, at 684. I contend only that the "special factors" analysis of *Bivens* and the functional analysis of immunity are based on identical judicial concerns which, when correctly applied, should not and do not (as either a logical or practical matter) produce different outcomes. JUSTICE STEVENS explained it well:

> "The practical consequences of a holding that no remedy has been authorized against a public official are essentially the same as those flowing from a conclusion that the official has absolute immunity. Moreover, similar factors are evaluated in deciding whether to recognize an implied cause of action or a claim of immunity. In both situations, when Congress is silent, the Court makes an effort to ascertain its probable intent." *Mitchell* v. *Forsyth*, 472 U. S. 511, 538–539 (1985) (concurring opinion).

Thus, the redundance which so troubles the Court in equation of the "special factors" analysis and the immunity analysis strikes me as evidence only that the analyses are being properly performed. And *Davis* cannot be characterized, as the Court asserts, as a *unique* case in which the "special factors" of *Bivens* were coextensive with the immunity granted.[10]

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[10] The Court does not provide an example of a situation in which the *Bivens* inquiry and the immunity inquiry might reach contrary conclusions. Of course, I cannot produce "any *reason* for creating" an equivalency between the two analyses as to this particular case. *Ante*, at 685. Neither I nor the Court has any idea what functions were performed by the petitioner officials, so I cannot argue that the considerations militating in favor of qualified immunity here also militate in favor of permitting a cause of action.

When performing the *Bivens* analysis here, therefore, the Court should examine our cases discussing immunity for federal officials.[11]

B

The Court historically has conferred absolute immunity on officials who intentionally violate the constitutional rights of citizens only in extraordinary circumstances. Qualified immunity (that is, immunity for acts that an official did not know, or could not have known, violated clearly established constitutional law) "represents the norm." See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 807 (1982) (Presidential aides); *Mitchell, supra* (United States Attorney General); *Butz* v. *Economou*, 438 U. S. 478 (1978) (Cabinet officers).[12]

In *Butz*, we balanced "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority," *id.*, at 506, against the crucial importance of a damages remedy in deterring federal officials from committing constitutional wrongs and vindicating the rights of citizens, *id.*, at 504–505.[13] After full consideration of potential adverse consequences, we decided that the extension of absolute immunity to federal officials would "seriously erode the protection provided by basic constitutional guarantees," *id.*, at 505, and undermine the basic assumption of our jurisprudence: "that all individuals, *whatever their position in government*, are subject to federal law." *Id.*, at 506 (emphasis added). Thus, we concluded that it is "not unfair to hold liable the official who knows or should know he is acting outside the law," and that "insisting on awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.*, at 506–507.

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[11] The Court's use of the doctrine of *Feres* v. *United States*, 340 U. S. 135 (1950), in its analysis of soldiers' *Bivens* actions reveals the connection between the "special factors" inquiry and the absolute immunity inquiry. In *Feres*, the Court decided that, in the FTCA, Congress had not waived sovereign immunity from damages for claims arising out of negligent acts of federal officials causing service-connected injury. When, as here, the Court decides whether a *Bivens* action exists, it necessarily decides whether the policies underlying *Feres* alter the usual rule of qualified immunity for federal officials. In both cases the question is how policies underpinning *Feres* affect immunity from money damages.

[12] The President, see *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982), prosecutors, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), and federal officials with prosecutorial and adjudicative functions, see *Butz, supra*, at 508–517, possess absolute immunity from damages actions arising from the violation of clearly established constitutional rights. But most public servants receive qualified, rather than absolute, immunity. See *Procunier* v. *Navarette*, 434 U. S. 555 (1978) (prison officials); *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975) (state hospital administrators); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974) (state executive officers); *Pierson* v. *Ray*, 386 U. S. 547 (1967) (police).

In *Butz* we acknowledged that federal officials may receive absolute immunity in the exercise of certain functions, but emphasized that the burden is on the official to demonstrate that an "exceptional situatio[n]" exists, in which "absolute immunity is *essential* for the conduct of the public business." See *Butz, supra*, at 507; *Harlow*, 457 U. S., at 812. The official seeking immunity "first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability," and "then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted." *Id.*, at 813.

Even when, as here, national security is invoked,[14] federal officials bear the burden of demonstrating that the usual rule of qualified immunity should be abrogated. In *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985), the Court found "no . . . historical or common-law basis for an absolute immunity for officers carrying out tasks essential to national security." *Id.*, at 521. In language applicable here, the Court pointed out: "National security tasks . . . are carried out in secret . . . . Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." *Id.*, at 522.[15] The Court highlighted the "danger that high federal officials will disregard constitutional rights in their zeal to protect the national security," and deemed it "sufficiently real to counsel against affording such officials an absolute immunity." *Id.*, at 523.

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[13] Qualified immunity for executive officials is the result of the balancing of "fundamentally antagonistic social policies." *Barr* v. *Mateo*, 360 U. S. 564, 576 (1959) (plurality opinion). Civil damages compensate victims of wrongdoing and deter tortious conduct, while immunity encourages participation in government, allows courageous action in public service, and provides officials with the freedom to concentrate on their public responsibilities.

[14] The Government suggests that federal officers and agents gave LSD to Stanley and 1,000 other soldiers "for the purpose of 'ascertain[ing] the effects of the drug on their ability to function as soldiers' and 'to evaluate

This analysis of official immunity in the national security context applies equally to officials giving orders to the military. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Governor, the Adjutant General of the Ohio National Guard, and other National Guard officers were sued under 42 U. S. C. § 1983 for damages arising from injuries suffered when the Guard was deployed and ordered to fire its guns during a civil disturbance. The Court awarded only qualified immunity to the highest military officer of the State—the Governor (who commanded the State National Guard)—and to executive and military officers involved in the decision to take military

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the validity of the traditional security training . . . in the face of unconventional, drug enhanced interrogations.'" Brief for United States 3, n. 1 (quoting S. Rep. 411–412).

[15] Again in analysis equally applicable here, the Court observed that most officials who receive absolute immunity from suits for damages with regard to certain functions are subject to other checks "that help to prevent abuses of authority from going unredressed." 472 U. S., at 522 (legislators are accountable to their constituents, and the judicial process is theoretically self-correcting by appellate review). But "[s]imilar built-in restraints on the Attorney General's activities in the name of national security . . . do not exist." *Id.*, at 523.

action.[16] *Scheuer* demonstrates that executive officials may receive only qualified immunity even when the function they perform is military decisionmaking.[17]

Whoever the officials in this case are (and we do not know), and whatever their functions, it is likely that under the Court's usual analysis, they, like most Government officials, are not entitled to absolute immunity. The record does not reveal what offices the individual petitioners held, let alone what functions they normally performed, or what functions they were performing at the time they (somehow) participated in the decision to administer LSD to Stanley (and 1,000 other soldiers). The Court has no idea whether those officials can carry "the burden of showing that public policy requires [absolute immunity]" for effective performance of those functions. *Butz*, 438 U. S., at 506. Yet the Court grants them absolute immunity, so long as they intentionally inflict only service-connected injuries, doing violence to the principle that "extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees." *Id.*, at 505. The case should be remanded and petitioners required to demonstrate that absolute immunity was necessary to the effective performance of their functions.

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[16] See also *Butz*, 438 U. S., at 491–492 (In finding qualified immunity for federal officials, the Court relied in part upon "a case involving military discipline, [in which] the Court issued a similar ruling [authorizing immunity absent willful or malicious conduct]"); Burgess, Official Immunity and Civil Liability for Constitutional Torts Committed by Military Commanders After *Butz* v. *Economou*, 89 Mil. L. Rev. 25, 46–47 (1980) (reading *Butz* to militate against intramilitary immunity in suits alleging constitutional violations).

[17] *Chappell* v. *Wallace*, 462 U. S. 296 (1983), which I discuss in detail *infra*, at 700–707, is not to the contrary. There the Court found that a "special factor"—the need for effective performance of active duty command—entitled military officers to absolute immunity from damages for injuries inflicted upon direct subordinates. Relying on the "special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel"—the Court decided that the military command function "would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Id.*, at 304. The unique requirements of intramilitary authority drove the Court in *Chappell;* those concerns do not govern here, where we address the immunity of officials whose relationship with Stanley is unknown.

C

It is well accepted that when determining whether and what kind of immunity is required for Government officials, the Court's decision is informed by the common law. See *Nixon* v. *Fitzgerald*, 457 U. S. 731, 747 (1982); *Mitchell*, *supra*, at 521; *Butz*, *supra*, at 508. My conclusion that qualified, rather than absolute, immunity is the norm for Government officials, even in cases involving military matters, is buttressed by the common law.

At common law, even military superiors received no exemption from the general rule that officials may be held accountable for their actions in damages in a civil court of law.[18] "[T]he English judiciary refused to adopt absolute immunity as an essential protection of [intramilitary] discipline,"[19] and "[t]he original American decisions in intramilitary cases [also] adopted a qualified immunity in intentional tort cases." Zillman, Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort, 60 N. C. L. Rev. 489, 498, 499 (1982).[20] The best-known American case is *Wilkes* v. *Dinsman*, 7 How. 89 (1849), after remand, *Dinsman* v. *Wilkes*, 12 How. 390 (1852). In that case, this Court permitted a Navy seaman to bring a claim against his superior officer for injuries resulting from willful torts. Although the Court suggested that the commander was entitled to a jury charge providing some immunity, it refused to confer absolute immunity from liability for intentional torts:

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[18] See W. Winthrop, Military Law and Precedents 880–885 (2d ed. 1920) (collecting decisions in which servicemembers sued their superiors for the intentional torts of libel, malicious prosecution, false imprisonment, and other service-related injuries). The Winthrop treatise reveals that military officers had only a defense of an absence of malice respecting actions within the scope of their authority, a defense closely resembling qualified immunity.

[19] Some English cases do suggest absolute immunity for intramilitary torts. See *Sutton* v. *Johnstone*, 1 T. R. 492, 99 Eng. Rep. 1215, 1246 (K. B. 1786) (dictum); *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806, 841, 176 Eng. Rep. 800, 815 (N. P. 1866); *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94, 115 (1869). But there is strong authority on the other side, and, before the question became the subject of statutory law, see Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44, the English courts considered the matter unresolved. See *Fraser* v. *Balfour*, 87 L. J. K. B. 1116, 1118 (1918) (court observed that the question of immunity in intramilitary torts was "still open").

> "It must not be lost sight of . . . that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.
>
> "The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office." 7 How., at 123.[21]

As noted above, the Court subsequently used *Wilkes* as an example of the usual practice of affording only qualified immunity to government officials. See *Butz*, 438 U. S., at 491. In addition, in *Chappell* v. *Wallace*, 462 U. S., at 305, n. 2, the Court distinguished *Wilkes*, plainly indicating that *Chappell* did *not* hold that soldiers could never sue for service-connected injury inflicted by an intentional tort. Indeed, by preserving *Wilkes*, the Court suggested that even military officials would not always be absolutely immune from liability for such conduct.

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[20] See, *e. g.*, *Wilson* v. *MacKenzie*, 7 Hill 95 (N. Y. Sup. Ct. 1845) (citing cases) (naval officer was sued for the beating and imprisonment of an enlisted man; court rejected defense of absolute immunity, stating that English courts had allowed suits for acts done under the rubric of military discipline); *Maurice* v. *Worden*, 54 Md. 233 (1880) (professor at the United States Naval Academy sued his superior officers for libel; state court rejected defense of absolute immunity).

[21] See also *Dinsman* v. *Wilkes*, 12 How. 390, 403 (1852) (although discipline may be endangered by civil damages suits, the Nation will be dishonored if a servicemember can "be oppressed and injured by his commanding officer, from malice or ill-will, or the wantoness of power, without giving him redress in the courts of justice").

Although *Chappell* reveals that we have moved away from the common-law rule in cases involving the command relationship between soldiers and their superiors, our immunity cases and a close analysis of *Chappell*, see *infra* this page and 701–707, reveal that there is no justification for straying further.

III

A

In *Chappell* the Court created a narrow exception to the usual rule of qualified immunity for federal officials. Repeatedly referring to the "'peculiar and special relationship of the soldier to his superiors,'" and to the need for "immediate compliance with military procedures and orders," the Court held that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." 462 U. S., at 300, 305 (quoting *United States* v. *Brown*, 348 U. S. 110, 112 (1954)).[22] Although the Court concedes this central focus of *Chappell*, it gives short shrift to the obvious and important distinction between *Chappell* and the present case, namely, that the defendants are not alleged to be Stanley's superior officers. Instead the Court seizes upon the statement in *Chappell* that our analysis in that case was guided by the concerns underlying the *Feres* doctrine, and dramatically expands the carefully limited holding in *Chappell*, extending its reasoning beyond logic and its meaning beyond recognition.

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[22] The Court concedes that "Stanley and the lower courts may well be correct that *Chappell* implicates military chain-of-command concerns more directly than do the facts alleged here," and that in *Chappell* we "explicitly focus[ed] on the officer-subordinate relationship that existed in [that] case," using language that "would not be applicable here." *Ante*, at 680. For example, we highlighted the need for "special regulations in relation to military discipline" and the "hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and *wholly different from civilian patterns*." *Chappell*, 462 U. S., at 300 (emphasis added).

The Court reasons as follows: In *Chappell* we stated that the concern for "military discipline" underlying the *Feres* doctrine would guide our analysis of the soldiers' *Bivens* claims against their superior officers. 462 U. S., at 299. In *United States* v. *Johnson*, 481 U. S. 681 (1987), we held that the concerns underlying the *Feres* doctrine precluded a soldier's FTCA claim for service-connected injury, even against civilian federal officials. Thus, the Court concludes, the concerns underlying the *Feres* doctrine preclude Stanley's *Bivens* action for service-connected injury against civilian federal officials.

This argument has a number of flaws. First, in *Chappell* we said with good reason that our analysis would be "guided," not governed, by concerns underlying *Feres*. The *Bivens* context differs significantly from the FTCA context; *Bivens* involves not negligent acts, but intentional constitutional violations that must be deterred and punished. Because *Chappell* involved the relationship at the heart of the *Feres* doctrine—the relationship between soldier and superior—the Court found *Feres* considerations relevant, and provided direct military superiors with absolute immunity from damages actions filed by their subordinates. Here, however, the defendants are federal officials who perform *unknown* functions and bear an *unknown* relationship to Stanley. Thus, we must assure ourselves that concerns underlying the *Feres* doctrine actually *do* require absolute immunity from money damages before we take the drastic step of insulating officials from liability for intentional constitutional violations. This the Court utterly fails to do.

Second, two of the three *Feres* rationales that decided *Johnson, supra*, are entirely inapplicable here.[23] Thus, the Court relies solely upon the third *Feres* rationale—a solicitude for military discipline. The *Feres'* concern for military discipline itself has three components. The first, the concern for the instinctive obedience of soldiers to orders, is of central importance in the *Feres* doctrine.[24] That rationale profoundly and exclusively concerned the Court in *Chappell* which involved the relationship between a superior officer and those in his or her command.[25] This concern for instinctive obedience is not at all implicated where a soldier sues civilian officials.[26]

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[23] First, in *Feres* the Court feared that allowing FTCA recovery, which varies from State to State, would impinge upon the military's need for uniformity. In contrast, *Bivens* actions are governed by uniform federal law. Second, the "swift," "efficient," and "generous statutory disability and death benefits" of the Veterans' Benefits Act (VBA), 72 Stat. 1118, as amended, 38 U. S. C. § 301 *et seq.*, constitute "an independent reason why the *Feres* doctrine bars suit for service-related injuries." *United States* v. *Johnson*, 481 U. S. 681, 689 (1987). But the VBA fails to address the violation of constitutional rights unaccompanied by personal injury that is not defined as disabling. Those whose constitutional rights are infringed, resulting in humiliation or "in mere pain and suffering, but no lasting permanent physical injury, would not be compensated at all." Donaldson, Constitutional Torts and Military Effectiveness: A Proposed Alternative to the *Feres* Doctrine, 23 A. F. L. Rev. 171, 198–199 (1982–1983).

[24] In *Johnson, supra*, when the Court extended the application of *Feres* to preclude suits for service-connected injuries against civilian officials, the Court did not refer to, or rely upon, *Feres'* concern with obedience to orders. Of course, this aspect of military discipline would not be implicated in *Johnson*, or in any cases involving tortious conduct by a civilian official. But in *Johnson*, two of the three major rationales underlying *Feres*—the concern for uniformity and the congressional provision of thoroughgoing compensation—were relevant. Neither of these rationales applies here. See n. 22, *supra*.

[25] Stanley points out that he was administered LSD without his knowledge so that he could not have disobeyed any order given him. Had his military superior surreptitiously administered the LSD to him, this fact alone might distinguish a suit for damages against that official from the suit in *Chappell*. Here, however, the fact that the LSD was given Stanley without his knowledge simply removes the case one step further from

As for the other components of the concern for military discipline, their application is entirely different in the *Bivens* context. The Court fears that military affairs might be disrupted by factual inquiries necessitated by *Bivens* actions. The judiciary is already involved, however, in cases that implicate military judgments and decisions, as when a soldier sues for nonservice-connected injury, when a soldier sues civilian contractors with the Government for service-connected injury, and when a civilian is injured and sues a civilian contractor with the military or a military tortfeasor. See *John-*

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the concern for obedience to orders that the Court chose to protect in *Chappell.*

[26] I do not mean to imply that *Chappell* suggests that *Bivens* actions against military officials *other than* direct superiors are precluded. Criticisms of the blanket application of *Feres* in the *Bivens* context have equal force in the context of intentional intramilitary torts that do not involve the direct chain of command. "The policy argument for absolute immunity . . . rests on the dubious proposition that a serviceman is more likely to respect authority when he has no recourse for the intentional or malicious deprivation of his constitutional rights. The contrary argument—that safeguarding rights compatible with military needs will engender respect for authority and promote discipline—is more appealing." Note, Intramilitary Immunity and Constitutional Torts, 80 Mich. L. Rev. 312, 328 (1981). Cf. *Johnson, supra,* at 700 (SCALIA, J., dissenting) ("Or perhaps—most fascinating of all to contemplate—Congress thought that *barring* recovery by servicemen might adversely affect military discipline").

Nor does the military view the authority intentionally to violate the constitutional rights of soldiers as essential to its mission. See Uniform Code of Military Justice (UCMJ), 10 U. S. C. §§ 938, 939, discussed *infra,* at n. 27. Moreover, the military does not require instinctive or reflexive obedience of the soldier in all contexts (combat being the obvious counterexample). Soldiers are subject to criminal sanctions if they *obey* certain orders. See *United States* v. *Calley,* 22 U. S. C. M. A. 534, 48 C. M. R. 19 (1973) (obedience to orders no defense where defendant should have known that order to kill civilians was illegal); *United States* v. *Kinder,* 14 C. M. R. 742 (USAF Ct. Mil. Rev. 1954) (obedience to orders no defense for soldier who executed order to shoot subdued prisoner at South Korean air base).

son, 481 U. S., at 700 (SCALIA, J., dissenting).[27] Although the desire to *limit* the number of such cases might justify the decision not to allow soldiers' FTCA suits arising from *negligent* conduct by civilian Government employees, see *United States* v. *Johnson*, *supra*, it is insufficient to preclude suits against civilians for *intentional* violations of constitutional rights. Unless the command relationship (or some other consideration requiring absolute immunity) is involved, these violations should receive moral condemnation and legal redress without limitation to that accorded negligent acts.

Finally, the Court fears that the vigor of military decisionmaking will be sapped if damages can be awarded for an incorrect (albeit intentionally incorrect) choice. Of course, this case involves civilian decisionmakers, but because the injury was service connected, we must assume that these civilian judgments are somehow intertwined with conduct of the military mission. See *Johnson*, *supra*, at 691. The significant difference between the *Feres* (FTCA) and *Bivens* (constitutional claim) contexts, however, is that, in the latter, the vigorous-decisionmaking concern has already been taken into account in our determination that qualified immunity is the general rule for federal officials, who *should* be required "on occasion . . . to pause to consider whether a proposed course of action can be squared with the Constitution." *Mitchell*, 472 U. S., at 524. The special requirements of command that concerned us in *Chappell* are not implicated in this case, and neither the Government nor the Court offers any plausible reason to extend absolute immunity to these civilian officials for their intentional constitutional violations.

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[27] In addition, judicial involvement occurs when courts review court-martial proceedings (through federal habeas corpus jurisdiction), see *Burns* v. *Wilson*, 346 U. S. 137, 142 (1953), when the Court of Claims reviews cases involving interference with military career advantage, see 28 U. S. C. § 1491, and when soldiers bring claims for injunctive and declaratory relief from statutory and constitutional violations. See also UCMJ, 10 U. S. C. § 938 (providing complaint procedure for "[a]ny member of the armed forces who believes himself wronged by his commanding officer"); § 939 (providing procedure for damages arising from willful damage to property of any soldier by another member of the Armed Services); *Colson* v. *Bradley*, 477 F. 2d 639 (CA8 1973) (judicial review of § 938 claim); *Cortright* v. *Resor*, 447 F. 2d 245 (CA2 1971) (same).

In *Chappell*, the Court did not create an inflexible rule, requiring a blind application of *Feres* in soldiers' cases raising constitutional claims. Given the significant interests protected by *Bivens* actions, the Court must consider a constitutional claim in light of the concerns underlying *Feres*. If those concerns are not implicated by a soldier's constitutional claim, *Feres* should not thoughtlessly be imposed to prevent redress of an intentional constitutional violation.[28]

The Court decides that here (as indeed in any case) one might select a higher level of generality for the *Chappell* holding, and concludes that any *Bivens* action arising from a service-connected injury is foreclosed by "special factors counselling hesitation." *Bivens*, 403 U. S., at 396. The Court concedes that "[t]his is essentially a policy judgment," which depends upon "how much occasional, unintended impairment of military discipline one is willing to tolerate." *Ante*, at 681. But the Court need not make a policy judgment; in our immunity cases we have an established legal framework within which to consider whether absolute immunity from money damages is required in any particular situation. Were I to concede that military discipline is somehow implicated by the award of damages for intentional torts against civilian officials (which I do not, see *supra*, at 702-703), I would nonetheless conclude, in accord with our usual immunity analysis, that the decisionmaking of federal officials deliberately choosing to violate the constitutional rights of soldiers *should be impaired.* I cannot comprehend a policy judgment that frees all federal officials from any doubt that they may intentionally, and in bad faith, violate the constitutional rights of those serving in the Armed Forces. The principles of accountability embodied in *Bivens*—that no official is above the law, and that no violation of right should be without a remedy—apply.

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[28] The Court states that, in the FTCA context, it is theoretically "freer to compromise military concerns . . . since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified," while in the *Bivens* context, we "rely upon inference for our own authority to allow money damages." *Ante*, at 681–682. One could approach the question from an entirely different angle. The usual rule with regard to suing the United States is sovereign immunity, so the FTCA creates an exception to that rule which must be narrowly interpreted. The usual rule is individual accountability for injury done, and qualified immunity of federal officials represents a judge-made exception to that rule. Our decision to find "special factors" in a *Bivens* case and grant absolute immunity to federal officials with regard to a certain class of injuries represents a further and indefensible enlargement of a special status.

B

The second "special factor" in *Chappell*—congressional activity "provid[ing] for the review and remedy of complaints and grievances such as those presented by" the injured soldier—is not present here. *Chappell*, 462 U. S., at 302.[29] The Veterans' Benefits Act is irrelevant where, as here, the injuries alleged stem (in large part) from pain and suffering in forms not covered by the Act. The UCMJ assists only when the soldier is on active duty and the tortfeasor is another military member. Here, in contrast to the situation in *Chappell*, no intramilitary system "provides for the . . . remedy" of Stanley's complaint. 462 U. S., at 302. See also *Bush* v. *Lucas*, 462 U. S. 367, 386, 388, 378, n. 14 (1983) (special factors counseling hesitation found because claims were "fully cognizable" within an "elaborate remedial system," providing "comprehensive," "meaningful," and "constitutionally adequate" remedies).

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[29] In *Chappell*, the Court makes plain that, standing alone, the "special nature of [the] military" would not have sufficed to confer absolute immunity upon military superiors for wrongs inflicted upon those in their command. It was the "unique disciplinary structure of the Military Establishment *and* Congress' activity in the field" that *"[t]aken together"* constituted those special factors precluding any damages award. 462 U. S., at 304 (emphasis added).

Nonetheless, the Court finds Congress' activity (and inactivity) of particular significance here, because we are confronted with a constitutional authorization for Congress to "'make Rules for the Government and Regulation of the land and naval Forces.'" *Ante*, at 679 (quoting U. S. Const. Art. I, §8, cl. 14). First, the existence of a constitutional provision authorizing Congress to make intramilitary rules does not answer the question whether *civilian* federal officials are immune from damages in actions arising from service-connected injury. Second, *any time* Congress acts, it does so pursuant to either an express or implied grant of power in the Constitution. If a *Bivens* action were precluded any time Congress possessed a constitutional grant of authority to act in a given area, there would be no *Bivens*. In fact, many administrative agencies exist and function entirely at the pleasure of Congress, yet the Court has not hesitated to infer *Bivens* actions against these agencies' officials. This is so no matter how explicitly or frequently the Constitution authorizes Congress to act in a given area. Even when considering matters most clearly within Congress' constitutional authority, we have found that a *Bivens* action will lie. See *Davis* v. *Passman*, 442 U. S. 228 (1979).

In *Chappell* the Court found that both the imperatives of military discipline and the congressional creation of constitutionally adequate remedies for the alleged violations constituted "special factors counselling hesitation," and refused to infer a *Bivens* action. In this case, the invocation of "military discipline" is hollow, and congressional activity nonexistent; a *Bivens* action must lie.

IV

> "The soldier's case is instructive: Subject to most unilateral discipline, forced to risk mutiliation and death, conscripted without, perhaps against, his will—he is still

> conscripted with his capacities to act, to hold his own or fail in situations, to meet real challenges for real stakes. Though a mere 'number' to the High Command, he is not a token and not a thing. (Imagine what he would say if it turned out that the war was a game staged to sample observations on his endurance, courage, or cowardice.)" H. Jonas, Philosophical Reflections on Experimenting with Human Subjects, in Experimentation with Human Subjects 3 (P. Freund ed. 1969).

The subject of experimentation who has not volunteered is treated as an object, a sample. James Stanley will receive no compensation for this indignity. A test providing absolute immunity for intentional constitutional torts *only* when such immunity was essential to maintenance of military discipline would "take into account the special importance of defending our Nation without completely abandoning the freedoms that make it worth defending." *Goldman* v. *Weinberger*, 475 U. S. 503, 530–531 (1986) (O'CONNOR, J., dissenting). But absent a showing that military discipline is concretely (not abstractly) implicated by Stanley's action, its talismanic invocation does not counsel hesitation in the face of an intentional constitutional tort, such as the Government's experimentation on an unknowing human subject. Soldiers ought not be asked to defend a Constitution indifferent to their essential human dignity. I dissent.

JUSTICE O'CONNOR, concurring in part and dissenting in part.

I agree with both the Court and JUSTICE BRENNAN that James Stanley's cause of action under the Federal Tort Claims Act (FTCA), 28 U. S. C. §2671 *et seq.*, should not have been reinstated by the Court of Appeals. I therefore join Part I of the Court's opinion. I further agree with the Court that under *Chappell* v. *Wallace*, 462 U. S. 296 (1983), there is generally no remedy available under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), for injuries that arise out of the course of activity incident to military service. *Ante*, at 683–684. In *Chappell* v. *Wallace*, *supra*, this Court unanimously held that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations. The "special factors" that we found relevant to the propriety of a *Bivens* action by enlisted personnel against their military superiors "also formed the basis" of this Court's decision in *Feres* v. *United States*, 340 U. S. 135 (1950), that the FTCA does not extend to injuries arising out of military service. *Chappell*, *supra*, at 298. In my view, therefore, *Chappell* and *Feres* must be read together; both cases unmistakably stand for the proposition that the special circumstances of the military mandate that civilian courts avoid entertaining a suit involving harm caused as a result of military service. Thus, no amount of negligence, recklessness, or perhaps even deliberate indifference on the part of the military would justify the entertainment of a *Bivens* action involving actions incident to military service.

Nonetheless, the *Chappell* exception to the availability of a *Bivens* action applies only to "injuries that 'arise out of or are in the course of activity incident to service.'" *Ante*, at 684 (quoting *Feres* v. *United States*, *supra*, at 146). In my view, conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission. The bar created by *Chappell*—a judicial exception to an implied remedy for the violation of constitutional rights—surely cannot insulate defendants from liability for deliberate and calculated exposure of otherwise healthy military personnel to medical experimentation without their consent, outside of any combat, combat training, or military exigency, and for no other reason than to gather information on the effect of lysergic acid diethylamide on human beings.

No judically crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case. Indeed, as JUSTICE BRENNAN observes, the United States military played an instrumental role in the criminal prosecution of Nazi officials who experimented with human subjects during the Second World War, *ante*, at 687, and the standards that the Nuremberg Military Tribunals developed to judge the behavior of the defendants stated that the "voluntary consent of the human subject is absolutely essential . . . to satisfy moral, ethical and legal concepts." *United States* v. *Brandt* (The Medical Case), 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, p. 181 (1949). If this principle is violated the very least that society can do is to see that the victims are compensated, as best they can be, by the perpetrators. I am prepared to say that our Constitution's promise of due process of law guarantees this much. Accordingly, I would permit James Stanley's *Bivens* action to go forward, and I therefore dissent.

PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-5. Argued March 3, 1986—Reargued October 15, 1986—Decided June 26, 1987

In 1977, the Delaware Valley Citizens' Council for Clean Air (hereafter respondent) and the United States each filed suit to compel Pennsylvania to comply with certain provisions of the Clean Air Act (Act). (See 478 U. S. 546, an earlier decision in this case setting forth a detailed statement of the facts.) A consent decree, approved by the Federal District Court in 1978, obligated Pennsylvania to establish a program for the inspection and maintenance of vehicle emissions systems in certain counties by August 1980. The State failed to do so, and protracted litigation ensued. In 1983, the parties agreed to set June 1, 1984, as the date the State would commence the program. Shortly after such agreement, respondent petitioned the District Court for attorney's fees and costs, pursuant to § 304(d) of the Act, for the work performed after the issuance of the consent decree. The court divided the work into phases and determined the lodestar amount for attorney's fees (the product of reasonable hours times a reasonable rate) for each phase. For certain phases, the court adjusted the figure upward by doubling the lodestar to reflect the risk presumably faced by respondent that it would not prevail on such phases of the litigation. The Court of Appeals affirmed the District Court's enhancement of the fee award. The issue presented here is whether, under § 304(d), when a plaintiff prevails, its attorney, under a contingent fee arrangement, should or may be awarded separate compensation for the risk of losing and not being paid.

Held: The judgment is reversed.

762 F. 2d 272, reversed.

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE SCALIA, concluded that § 304(d) should be construed as not permitting enhancement of a reasonable lodestar fee to compensate for an attorney's assuming the risk of loss and of nonpayment, and that even if § 304(d) is construed to permit such enhancement in appropriate cases, it was error to do so in this case. Pp. 723-731.

JUSTICE O'CONNOR concluded that Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions such as § 304(d), but that the District Court erred in employing a risk multiplier in the circumstances of this case. Pp. 731–734.

JUSTICE BLACKMUN, joined by JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, concluded that Congress intended § 304(d) to allow an upward adjustment, in appropriate circumstances, for a case taken on a contingent basis, and that the award in this case should be vacated and the case should be remanded to the District Court for further findings. Pp. 735–755.

WHITE, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, in which REHNQUIST, C. J., and POWELL, O'CONNOR, and SCALIA, JJ., joined, and an opinion with respect to Parts III–B, IV, and V, in which REHNQUIST, C. J., and POWELL and SCALIA, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 731. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 735.

Jay C. Waldman reargued the cause for petitioners. With him on the briefs on reargument were *Henry G. Barr*, *John P. Krill*, and *John M. Hrubovcak*. With him on the briefs on the original argument were *Spencer A. Manthorpe* and Messrs. Barr, Hrubovcak, and Krill.

Donald B. Ayer reargued the cause for the United States as respondent under this Court's Rule 19.6 in support of petitioners. *Kathryn A. Oberly* argued the cause for the United States on the original argument. With her on the brief were *Solicitor General Fried*, *F. Henry Habicht II*, and *Deputy Solicitor General Geller*.

James D. Crawford reargued the cause for respondents. With him on the brief was *Joyce S. Meyers*.*

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*Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Eugene C. Thomas*, *John R. Hupper*, *Thomas D. Barr*, and *John H. Pickering;* and for Joseph A. Bonjorno et al. by *Henry T. Reath* and *Michael M. Baylson*.

Briefs of *amici curiae* were filed for the State of Arizona et al. by *Francis X. Bellotti*, Attorney General of Massachusetts, and *Suzanne E. Durrell*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *Joseph I. Lieberman*, Attorney General of Connecticut, *Michael J. Bowers*, Attorney General of Georgia, *Richard G. Opper*, Attorney General of Guam, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Jim*

JUSTICE WHITE announced the judgment of the Court and delivered an opinion, Parts I, II, and III–A of which represent the views of the Court, and Parts III–B, IV, and V of which are joined by THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE SCALIA.

This case involves the award of an attorney's fee to the prevailing party pursuant to § 304(d) of the Clean Air Act, 42 U. S. C. § 7604(d).[1]

I

We set forth a detailed statement of the facts underlying this litigation in *Pennsylvania* v. *Delaware Valley Citizens'*

Jones, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, and *Louis J. Caruso*, Solicitor General, *Edward Lloyd Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Stephen E. Merrill*, Attorney General of New Hampshire, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Michael C. Turpen*, Attorney General of Oklahoma, *T. Travis Medlock*, Attorney General of South Carolina, *Jeffrey L. Amestoy*, Attorney General of Vermont, *William Broaddus*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charles G. Brown*, Attorney General of West Virginia, and *A. G. McClintock*, Attorney General of Wyoming; and for Twelve Small Private Civil Rights Law Firms by *John Leubsdorf*.

[1] Section 304(d) provides, in relevant part:

"The Court, in issuing any final order in any action brought pursuant to subsection (a) of this section may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the Court determines such award is appropriate."

Last Term in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546 (1986), we agreed with the Court of Appeals that in awarding attorney's fees under § 304(d) the courts should follow the principles and case law governing the award of such fees under 42 U. S. C. § 1988, which provides that in the actions specified in that section "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Council for Clean Air, 478 U. S. 546 (1986), and recite only an abbreviated version of those facts here. In 1977, the Delaware Valley Citizens' Council for Clean Air (hereinafter respondent) and the United States each filed suit to compel the Commonwealth of Pennsylvania to comply with certain provisions of the Clean Air Act. The parties entered into a consent decree, approved by the District Court in 1978,[2] which obligated the Commonwealth to establish a program for the inspection and maintenance of vehicle emissions systems in 10 counties in the Philadelphia and Pittsburgh areas by August 1, 1980. The Commonwealth failed to implement the program by this date, and protracted litigation ensued. Ultimately, in May 1983, the parties agreed to set June 1, 1984, as the date on which the Commonwealth would commence the inspection and maintenance program. Shortly after this agreement, respondent petitioned the District Court for attorney's fees and costs for the work performed after the issuance of the consent decree. In determining the amount of fees to be awarded, the District Court divided the work performed by respondent's counsel into nine phases. See 478 U. S., at 549–553. After computing the lodestar for each phase, the District Court adjusted this figure upward in phases four, five, and seven by doubling the lodestar to reflect the risk presumably faced by respondent that it would not prevail on these phases of the litigation. The District Court observed:

> "The contingent nature of plaintiff's success has been apparent throughout this litigation. Plaintiffs entered the litigation against the U. S. Government and the Commonwealth of Pennsylvania. The case involved new and novel issues, the resolution of which had little or no precedent. . . . [P]laintiffs have had to defend their rights under the consent decree due to numerous

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[2] At this time, respondent was awarded an attorney's fee for work done by its counsel, the Public Interest Law Center of Philadelphia (PILCOP), prior to the date of the consent decree.

> attempts by defendants and others to overturn or circumvent this Court's Orders." 581 F. Supp. 1412, 1431 (1984).

The Court of Appeals for the Third Circuit affirmed the District Court's enhancement of the fee award for contingency of success, 762 F. 2d 272, 282 (1985), a judgment that we now reverse.[3]

II

We first focus on the nature of the issue before us. Under the typical fee-shifting statute, attorney's fees are awarded to a prevailing party and only to the extent that party prevails. See, *e. g.*, *Maher* v. *Gagne*, 448 U. S. 122, 129–130 (1980); *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983). Hence, if the case is lost, the loser is awarded no fee; and unless its attorney has an agreement with the client that the attorney will be paid, win or lose, the attorney will not be paid at all. In such cases, the attorney assumes a risk of nonpayment when he takes the case. The issue before us is whether, when a plaintiff prevails, its attorney should or may be awarded separate compensation for assuming the risk of not being paid. That risk is measured by the risk of losing rather than winning and depends on how unsettled the applicable law is with respect to the issues posed by the case and by how likely it is that the facts could be decided against the complainant. Looked at in this way, there are various factors that have little or no bearing on the question before us.

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[3] We granted certiorari last Term, 474 U. S. 815 (1984), heard argument, and issued an opinion holding that respondent was entitled to attorney's fees under § 304(d) for its counsel's work done in certain administrative proceedings because the work "was crucial to the vindication of Delaware Valley's rights under the consent decree . . . ." 478 U. S., at 561. We also concluded that the District Court erred by enhancing the fee award based on the "superior quality" of counsel's performance, reasoning that respondent did not show "why the lodestar did not provide a reasonable fee award reflecting the quality of representation . . . ." *Id.*, at 567. We did not, however, address the merits of the question now before of us, an issue that was left open in *Blum* v. *Stenson*, 465 U. S. 886 (1984). We thought that reargument on this issue would be beneficial. We therefore restored this aspect of the case to the docket for decision this Term. 478 U. S., at 568.

First is the matter of delay. When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later, as in this case. Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value. See, *e. g., Sierra Club* v. *EPA*, 248 U. S. App. D. C. 107, 120–121, 769 F. 2d 796, 809–810 (1985); *Louisville Black Police Officers Organization, Inc.* v. *Louisville*, 700 F. 2d 268, 276, 281 (CA6 1983). Although delay and the risk of nonpayment are often mentioned in the same breath, adjusting for the former is a distinct issue that is not involved in this case. We do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute.

Second, that a case involves an issue of public importance, that the plaintiff's position is unpopular in the community, or that defendant is difficult or obstreperous does not enter into assessing the risk of loss or determining whether that risk should be compensated. Neither does the chance that the court will find unnecessary and not compensate some of the time and effort spent on prosecuting the case.

Third, when the plaintiff has agreed to pay its attorney, win or lose, the attorney has not assumed the risk of nonpayment and there is no occasion to adjust the lodestar fee because the case was a risky one. See, *e. g., Jones* v. *Central Soya Co.*, 748 F. 2d 586, 593 (CA11 1984), where the court said that "[a] lawyer may not preserve a right of recourse against his client for fees and still expect to be compensated

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as if he had sacrificed completely his right to payment in the event of an unsuccessful outcome."

III

A

Although the issue of compensating for assuming the risk of nonpayment was left open in *Blum* v. *Stenson*, 465 U. S. 886 (1984), JUSTICE BRENNAN wrote that "the risk of not prevailing, and therefore the risk of not recovering any attorney's fees is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee." *Id.*, at 902 (concurring). Most Courts of Appeals are of a similar view and have allowed upward adjustment of fee awards because of the risk of loss factor.[4] The First Circuit,

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[4] Numerous Courts of Appeals, acting under fee-shifting statutes, have approved an upward adjustment of the lodestar to compensate for the risk of not prevailing. See, *e. g.*, *Crumbaker* v. *Merit Systems Protection Board*, 781 F. 2d 191, 196–197 (CA Fed. 1986); *Vaughns* v. *Board of Ed. of Prince Georges County*, 770 F. 2d 1244 (CA4 1985), aff'g 598 F. Supp. 1262, 1285–1286 (Md. 1984); *Riddell* v. *National Democratic Party*, 712 F. 2d 165, 169–170 (CA5 1983); *Kelley* v. *Metropolitan County Bd. of Ed.*, 773 F. 2d 677, 683, 686 (CA6 1985) (en banc), cert. denied, 474 U. S. 1083 (1986); *Craik* v. *Minnesota State University Bd.*, 738 F. 2d 348, 350–351 (CA8 1984); *White* v. *Richmond*, 713 F. 2d 458, 462 (CA9 1983); *Ramos* v. *Lamm*, 713 F. 2d 546, 557–558 (CA10 1983); *Jones* v. *Central Soya Co.*, 748 F. 2d 586, 591 (CA11 1984).

In addition to the Courts of Appeals for the District of Columbia Circuit and the Seventh Circuit, other courts have refused risk enhancement for a variety of reasons. See, *e. g.*, *Lewis* v. *Coughlin*, 801 F. 2d 570, 576 (CA2 1986) (upward adjustment vacated for failure to evaluate risk of loss); *Lanasa* v. *New Orleans*, 619 F. Supp. 39, 50–51 (ED La. 1985) (settlement for low money damages figure could have been agreed to much earlier in litigation); *Littlejohn* v. *Null Mfg. Co.*, 619 F. Supp. 149, 152 (WDNC 1985) (attorney received fully compensatory fee without adjustment); *Bennett* v. *Central Telephone Co. of Illinois*, 619 F. Supp. 640, 653 (ND Ill. 1985) (lack of supporting evidence and high hourly rates); *EEOC* v. *Burlington Northern Inc.*, 618 F. Supp. 1046, 1061–1062 (ND Ill. 1985) (high hourly rates and risk of nonsuccess not unusually high); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 613 F. Supp. 824, 835 (SDNY 1985) (no great incentive needed to encourage appellee to defend

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in *Wildman* v. *Lerner Stores Corp.*, 771 F. 2d 605 (1985), for example, takes this approach and allows an upward adjustment to the lodestar to account for the contingency factor. In that case, the District Court entered judgment on a jury verdict finding an employer liable for violating the Age Discrimination in Employment Act, 29 U. S. C. § 621 *et seq.*, and two Puerto Rican statutes. The court awarded the prevailing party a lodestar fee amount of $56,500 and then increased that figure by 50% to account for the fact that because of the difficulties of the action and the novelty of the issue, "the plaintiffs' attorneys . . . faced a contingency of losing all their time and effort." 771 F. 2d, at 610. In sustaining the enhancement of fee awards based on contingency, the Court of Appeals relied on the legislative history of 42 U. S. C. § 1988, detailed several additional reasons as to why it is necessary to increase the lodestar figure for contingent-fee cases, and concluded that rather than compensating lawyers for unsuccessful claims, an adjustment of the lodestar figure may be necessary in particular cases to provide for the reasonable attorney's fee envisioned by Congress.[5]

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its $276 million antitrust judgment on appeal); *Cook* v. *Block*, 609 F. Supp. 1036, 1043–1044 (DC 1985) (counsel guaranteed payment by client even if suit was unsuccessful); *Cherry* v. *Rockdale County*, 601 F. Supp. 78, 80–81 (ND Ga. 1984) (insufficient evidence supporting adjustment); *Inmates of Maine State Prison* v. *Zitnay*, 590 F. Supp. 979, 987 (Me. 1984) (contingency already reflected in lodestar); *Rank* v. *Balshy*, 590 F. Supp. 787, 799–800 (MD Pa. 1984) (contingency already reflected in lodestar).

[5] What the court viewed as the simple economics of the practice of law played a major part in the Court of Appeals' analysis:

"[T]he lodestar figure alone does not differentiate between the case taken on a full retainer and a case in which an attorney spends many hours over a period of months or years with no assurance of any pay if the suit is unsuccessful. Even if the client ultimately prevails, the burden of supporting salaried employees and fixed costs during the course of the contingent litigation can be substantial.

"Moreover, the attorney may face a second risk once his clients has prevailed—that the court will find some of his time duplicative, unnecessary, or inefficiently expended.

[Footnote 5 is continued on p. 719]

This construction of the fee-shifting statutes has not been universal. The District of Columbia Circuit is particularly skeptical of the purpose served by enhancing the lodestar amount to account for the risk of not prevailing. In *Laffey* v. *Northwest Airlines, Inc.*, 241 U. S. App. D. C. 11, 746 F. 2d 4 (1984), cert. denied, 472 U. S. 1021 (1985), the court reversed the trial court's decision to double the lodestar based on the risk factor, citing a wide variety of problems with such an approach. The court found that, in theory, there should be no limit on the size of the fee if risk enhancement is permitted, for the less likely the chances of success in a particular case, the more "entitled" the prevailing party should be to have the fee award reflect acceptance of this risk. In a similar vein, the contingency factor penalizes the losing parties with the strongest and most reasonable defenses, thus "creating a perverse penalty for those least culpable." 241 U. S. App. D. C., at 33, 746 F. 2d, at 26. Moreover, even if the risk of loss should be taken into account, "the chances of winning could not be set with anything approaching mathematical precision, and so vast increases in attorneys [fees] would derive from a spurious mathematical base." *Id.*, at 33–34, 746 F. 2d, at 26–27 (footnote omitted).

On a more fundamental level, the court found that using the risk of loss to increase the lodestar figure compensates attorneys not only for their successful efforts in one case, but for their unsuccessful claims asserted in related cases. This not only "encourag[es] marginal litigation," but raises "the

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"We think it clear that Congress did not intend that the enforcement of civil rights be limited primarily to those able to pay an attorney a full retainer or attract one of the few pro bono legal service organizations to their cause . . . [to] deny all considerations of the added burden and additional risks an attorney under a contingent fee agreement may have to bear does not strike us as 'reasonable.'" 771 F. 2d, at 612–613 (citations omitted). We note that some of the factors mentioned by the Court of Appeals are, in our mind, irrelevant to whether there should be separate compensation for assuming the risk of nonpayment.

reasonable question of 'why the subsidy [for unsuccessful litigation] should come from the defendant in another case.'" *Id.*, at 34, n. 138, 746 F. 2d, at 27, n. 138 (citations omitted).

Such a scheme was deemed to be manifestly inconsistent with Congress' intent to award attorney's fees only to prevailing parties. Relying on this Court's holding in *Hensley* that attorney's fees could not be awarded for claims unrelated to those on which the party ultimately prevailed, the court reasoned:

> "The same logic which restricts compensation to those portions of a lawsuit directly related to the relief procured also forbids multiplying attorneys fees so as effectively to compensate counsel for other, losing claims which may be brought. The prevailing party may expect full compensation for prevailing claims; there is no provision for compensating losing, unrelated claims in the same case, or other losing cases which might or might not involve the same parties. Any crude multiplier derived simply from the plaintiff's chance of success must be rejected as contrary to the congressional scheme." *Id.*, at 34–35, 746 F. 2d, at 27–28.

Finally, the court held that even if a contingency *enhancement*, as opposed to a contingency *multiplier*, could be used to reflect the party's initial chance of success, *Blum* made clear that such enhancements were proper only in the most exceptional of cases, and because "this case did not present an exceptional level of risk, no risk enhancement should be awarded." *Id.*, at 36, 746 F. 2d, at 29.[6]

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[6] The Seventh Circuit has ruled that "the risk of losing 'alone does not justify the use of a multiplier.'" *McKinnon* v. *Berwyn*, 750 F. 2d 1383, 1392 (1984) (citations omitted). That court followed the reasoning of *Laffey* v. *Northwest Airlines, Inc.*, 241 U. S. App. D. C. 11, 746 F. 2d 4 (1984), finding that "[t]he fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful . . . suits, even though the attorney's fee statute is expressly limited to cases where the party seeking the fee prevails." 750 F. 2d, at 1392. The

The bar and legal commentators have been much interested in the issue.[7] Some writers unqualifiedly have endorsed the concept of increasing the fee award to insure that lawyers will be adequately compensated for taking the risk of not prevailing. "The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 324–325 (1977).[8] See also, Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1615 (1976); Comment, 122 U. Pa. L. Rev. 636, 708–711 (1974).

Others have been considerably more reserved in their endorsement of a contingency bonus, focusing on four major problems with the use of this factor. First, evaluation of the risk of loss creates a potential conflict of interest between an attorney and his client, for in order to increase a fee award, a plaintiff's lawyer must expose all of the weaknesses

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court also reasoned that, in cases where the attorney has entered into a contingent-fee contract with his client, the attorney is already being compensated for the risk of loss, and "is not entitled to more insurance in the form of a risk multiplier." *Id.*, at 1393. *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy Inc.*, 776 F. 2d 646 (CA7 1985), and *Kirchoff* v. *Flynn*, 786 F. 2d 320 (CA7 1986), may evidence some withdrawal from that position, but in a still later case the Court of Appeals, citing *McKinnon*, said that "this circuit has not favored the use of risk multipliers." *In re Burlington Northern, Inc.*, 810 F. 2d 601, 608 (1986).

[7] Hearings before a congressional Subcommittee also illuminate the differing views about the desirability and necessity of enhancement for the risk of loss. Hearings on S. 2802 before the Subcommittee on the Constitution of the Committee on the Judiciary, 98th Cong., 2d Sess. (1984); Hearings on S. 1580 et al. before the Subcommittee on the Constitution of the Committee on the Judiciary, 99th Cong., 1st Sess. (1985).

[8] In a similar vein, "[i]f we want to encourage private attorney general suits, risky plaintiffs' test litigation, or claims for nonmonetary relief, forbidding the shifting of compensation for risk could deter the bringing of such cases." Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L. J. 651, 676.

and inconsistencies in his client's case, and a defendant's attorney must either concede the strength of the plaintiff's case in order to keep down the fee award, or "allo[w] the fee to be boosted by the contingency bonus [by] insisting that the plaintiff's victory was freakish." Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L. J. 473, 483 (1981) (Leubsdorf). Second, in order to determine the proper size of the contingency bonus, a court must retroactively estimate the prevailing party's chances for success from the perspective of the attorney when he first considered filing the suit. Not only is this mathematically difficult to compute, but "once the result is known, it is hard for judges and lawyers to regain a perspective of ignorance and to treat the result as only one of several that were initially possible." *Id.*, at 486.

The third problem with increasing the fee award to account for the risk of not prevailing is the same one identified by the courts which have questioned this practice: it penalizes the defendant with the strongest defense, and forces him to subsidize the plaintiff's attorney for bringing other unsuccessful actions against other defendants. *Id.*, at 488–491. See Note, 80 Colum. L. Rev. 346, 375 (1980). Finally, because the contingency bonus cannot be determined with either certainty or accuracy, it "cannot be justified on the ground that it provides an appropriate incentive for litigation." Leubsdorf 496. Cf. Note, 96 Harv. L. Rev. 677, 686, n. 51 (1983); Comment, 53 U. Chi. L. Rev. 1074 (1986).

There are other considerations. Fee-shifting removes the interest a paying client would have in ensuring that the lawyer is serving the client economically; the task of monitoring the attorney is shifted to the judge in separate litigation over fees if the plaintiff wins. Fee litigation occurs on a case-to-case basis and is often protracted, complicated, and exhausting. There is little doubt that it should be simplified to the maximum extent possible. If the decided cases are any measure, assessing the initial risk of loss when the case is over is a particularly uncertain matter, especially for a judge who is confident that he has correctly decided for the plaintiff, but then must inquire how weak the plaintiff's case was and how likely it was that he, the judge, would have been mistaken. It may be absurd to ask the judge to "determine the probability that he would have decided the case incorrectly." *Id.*, at 1094.

B

The disagreement among the Circuits and commentators indicates that Congress has not clearly directed or authorized multipliers or enhancements for assuming the risk of loss. Neither the Clean Air Act nor § 1988 expressly provides for using the risk of loss as an independent basis for increasing an otherwise reasonable fee, and it is doubtful that the legislative history supports the use of this factor. In concluding that risk-enhancement is authorized, JUSTICE BRENNAN in *Blum*, 465 U. S., at 902, relied on the fact that one of the items to be relied on in setting a fee and enumerated in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974), is whether the fee is fixed or contingent, and that Congress endorsed consideration of this factor. See S. Rep. No. 94–1011, p. 6 (1976) (S. Rep). But a careful reading of *Johnson* shows that the contingency factor was meant to focus judicial scrutiny solely on the existence of any contract for attorney's fees which may have been executed between the party and his attorney. "The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case." 488 F. 2d, at 718. See Leubsdorf 479, n. 38. At most, therefore, *Johnson* suggests that the nature of the fee contract between the client and his attorney should be taken into account when determining the reasonableness of a fee award, but there is nothing in *Johnson* to show that this factor was meant to reflect the contingent nature of prevailing in the lawsuit as a whole.

JUSTICE BRENNAN also noted that Congress cited *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (ND Cal. 1974) (subsequently aff'd, 550 F. 2d 464 (CA9 1977), rev'd on other grounds, 436 U. S. 547 (1978)), as one of several cases which "correctly applied" the *Johnson* factors. *Blum, supra,* at 903. The court there increased the lodestar based, in part, on contingency-of-success considerations. But Congress also cited two other cases which it found also "correctly applied" the *Johnson* criteria. In *Davis* v. *County of Los Angeles,* 8 EPD ¶9444, p. 5047 (CD Cal. 1974), the District Court added a "Result Charge" to the basic fee award. This award was not intended to compensate the lawyers for assuming the risk of not prevailing on the merits; instead, as the label suggests, the court increased the award because "counsel [had] achieved excellent results," and "[t]he nature of the case made it difficult to litigate. . . ." *Id.,* at 5048. The court in *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 66 F. R. D. 483 (WDNC 1975), the third illustrative case cited with approval by Congress, did not increase the basic fee award at all. Instead, after reviewing nine factors similar to those listed in *Johnson,* the court reduced the prevailing party's fee request by nearly 15%, choosing to "err on the conservative side in dealing with any fee question" rather than "contribute unnecessarily to the overpricing of litigation in this or any other court." 66 F. R. D., at 486. Given the divergence in both analysis and result between these three cases, the legislative history is, at best, inconclusive in determining whether Congress endorsed the concept of increasing the lodestar amount to reflect the risk of not prevailing on the merits.

We must nevertheless come to a decision and have concluded that the judgment must be reversed.

IV

We are impressed with the view of the Court of Appeals for the District of Columbia Circuit that enhancing fees for risk of loss forces losing defendants to compensate plaintiff's lawyers for not prevailing against defendants in other cases. This result is not consistent with Congress' decision to adopt the rule that only prevailing parties are entitled to fees. If risk multipliers or enhancement are viewed as no more than compensating attorneys for their willingness to take the risk of loss and of nonpayment, we are nevertheless not at all sure that Congress intended that fees be denied when a plaintiff loses, but authorized payment for assuming the risk of an uncompensated loss. Such enhancement also penalizes the defendants who have the strongest case; and in theory, at least, would authorize the highest fees in cases least likely to be won and hence encourage the bringing of more risky cases, especially by lawyers whose time is not fully occupied with other work. Because it is difficult ever to be completely sure that a case will be won, enhancing fees for the assumption of the risk of nonpayment would justify some degree of enhancement in almost every case.

Weighing all of these considerations, we are unconvinced that Congress intended the risk of losing a lawsuit to be an independent basis for increasing the amount of any otherwise reasonable fee for the time and effort expended in prevailing. As the Senate Report observed: "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' *Davis, supra; Stanford Daily, supra,* at 684." S. Rep. 6.

The contrary argument is that without the promise of multipliers or enhancement for risk-taking, attorneys will not take cases for clients who cannot pay, and the fee-shifting statutes will therefore not serve their purpose. We agree that a fundamental aim of such statutes is to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel, this by providing lawyers with reasonable fees to be paid by the the losing defendants. But it does not follow that fee enhancement for risk is necessary or allowable. Surely that is not the case where plaintiffs can afford to pay and have agreed to pay, win or lose. The same is true where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes. Nor is it true in those cases where plaintiffs secure help from organizations whose very purpose is to provide legal help through salaried counsel to those who themselves cannot afford to pay a lawyer. It is also unlikely to be true in any market where there are competent lawyers whose time is not fully occupied by other matters.

The issue thus involves damages cases that lawyers would not take, not because they are too risky (the fee-shifting statutes should not encourage such suits to be brought), but because the damages likely to be recovered are not sufficient to provide adequate compensation to counsel, as well as those frequent cases in which the goal is to secure injunctive relief to the exclusion of any claim for damages. In both situations, the fee-shifting statutes guarantee reasonable payment for the time and effort expended if the case is won. Respondent's position is that without the prospect of being awarded fees exceeding such reasonable payment, plaintiffs with such cases will be unable to secure the help that the statutes aimed to provide.

We are not persuaded that this will be the case. Indeed, it may well be that using a contingency enhancement is superfluous and unnecessary under the lodestar approach to setting a fee. The reasons a particular lawsuit are considered to be "risky" for an attorney are because of the novelty and difficulty of the issues presented, and because of the potential for protracted litigation. Moreover, when an attorney ultimately prevails in such a lawsuit, this success will be primarily attributable to his legal skills and experience, and to the hours of hard work he devoted to the case. These factors, however, are considered by the court in determining the reasonable number of hours expended and the reasonable hourly rate for the lodestar, and any further increase in this sum based on the risk of not prevailing would result not in a "reasonable" attorney's fee, but in a windfall for an attorney who prevailed in a difficult case.[9]

It may be that without the promise of risk enhancement some lawyers will decline to take cases; but we doubt that the bar in general will so often be unable to respond that the goal of the fee-shifting statutes will not be achieved. In any event, risk enhancement involves difficulties in administration and possible inequities to those who must pay attorney's fees; and in the absence of further legislative guidance, we conclude that multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes.

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[9] The District Court employed an interesting approach in denying a risk multiplier in *Cherry* v. *Rockdale County*, 601 F. Supp., at 80–81. The court noted that risk enhancement is justified only if it is needed to provide compensation at a sufficient level to attract capable advocates. Because no evidence had been proffered showing what level of compensation was necessary to so attract lawyers, there was an insufficient evidentiary base upon which to award a fee enhancement. The court then argued "by way of illustration only," why in the case before it the evidence would not support a risk multiplier. According to a national survey to which the court had access, if the two attorneys requesting fees were paid at the rate that the top 25% of law firm partners admitted at the same time were paid, they would earn $77,800 and $89,800, respectively, per year. If they were associates, their annual salaries would be $56,800 and $61,300. This same survey showed that practitioners in small firms had an average overhead expense of $47,000 per lawyer. The court assumed that a reasonably diligent lawyer should bill 2,000 hours per year (40 hours per week multiplied by 50 weeks). The court relied on the parties' affidavits that stated a reasonable hourly wage for these attorneys was $100. The court then concluded that if the attorneys lost one-third of their cases a year, their compensation would still be within the upper 25% of compensation for all lawyers—*i. e.*, $85,000 (($200,000 minus $68,000 (uncollectible)) minus $47,000 (overhead) equals $85,000). Any enhancement, the court observed, was simply unnecessary. If the lawyers lost one-half of all their cases in a year, some enhancement might be necessary, as compensation based on this loss rate would be only $53,000.

Even if § 304(d) and other typical fee-shifting statutes are construed to permit supplementing the lodestar in appropriate cases by paying counsel for assuming the risk of nonpayment, for the reasons set out below, it was error to do so in this case.

V

Section 304(d), like § 1988, does not indicate that adjustment for risk should be the rule rather than the exception; neither does it require such an adjustment in any case. At most, it leaves the matter of risk enhancement to the informed discretion of the courts. There are, however, severe difficulties and possible inequities involved in making upward adjustments for assuming the risk of nonpayment, and we deem it appropriate, in order to guide the exercise of the trial courts' discretion in awarding fees, to adopt here the approach followed in *Blum* in dealing with other multipliers. As in that case, payment for the time and effort involved—the lodestar—is presumed to be the reasonable fee authorized by the statute, and enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts.[10] *Blum*, 465 U. S., at 898–901.

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[10] We note the argument advanced by *amici* Arizona et al., but not dealt with by the parties or the courts below, that the attorneys for respondent, PILCOP, could not have properly accorded any weight whatsoever to the perceived risk of not prevailing when deciding to undertake representation in this case, due to PILCOP's tax-exempt status under the Internal Revenue Code. Brief for Arizona et al. as *Amici Curiae* 56–57. In its fee petition to the District Court, PILCOP asserted that it is "a non-profit, tax exempt law corporation," and that it was prohibited by certain Internal Revenue Service (IRS) "regulations" from accepting fees from its clients, including respondent. App. 161a–162a. PILCOP was undoubtedly referring to Rev. Proc. 71–39, 1971–2 Cum. Bull. 575, which provides that a public interest law firm desiring tax-exempt status may not accept fees for its services except in accordance with procedures approved by the IRS. Subsequently, the IRS issued Rev. Proc. 75–13, 1975–1 Cum. Bull. 662,

For several reasons, the circumstances of this case do not justify the risk multiplier employed by the District Court.

First, the District Court doubled the lodestar in three phases of the case in recognition of the risk of loss, saying that the "contingent nature of plaintiffs' success has been apparent" from the outset, that plaintiffs entered the litigation against the United States and the Commonwealth of Pennsylvania, and that the case involved new and novel issues, the resolution of which had little or no precedent. Furthermore, they had to "defend their rights under the consent decree due to numerous attempts by defendants and others to overturn or circumvent this court's orders." 581 F. Supp., at 1431. This case, however, concerns only the reasonable fee for work done after the consent decree was entered, and fees have already been awarded for work done before that time. The risk of nonpayment should be determined at the beginning of the litigation. *Lewis* v. *Coughlin*, 801 F. 2d 570, 576 (CA2 1986); *Ramos* v. *Lamm*, 713 F. 2d 546, 558 (CA10 1983).[11] Whatever counsel thought the risk of losing was at

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which amplified Rev. Proc. 71–39 by setting forth procedures under which a public interest law firm could accept fees for its services and maintain its charitable organization, tax-exempt status. These procedures included the requirement, among others, that the public interest law firm "not use the likelihood or probability of a fee award as a consideration in its selection of cases." The argument advanced is that the tax-exempt law firm really risks nothing in cases like this and that because PILCOP undertook to represent respondent's cause without regard to the likelihood of eventually recovering fees under § 304(d) of the Clean Air Act, it follows that PILCOP could not validly have entertained the notion that if respondent did ultimately succeed in the litigation, its fee award would possibly have been enhanced due to the risk of not prevailing. *Amici* note that the Court of Appeals for the Second Circuit does not allow a contingency multiplier in awarding fees to nonprofit law firms. *New York Assn. for Retarded Children, Inc.* v. *Carey*, 711 F. 2d 1136 (1983). We do not pass on the submission of the *amici*.

[11] "The test . . . should be an objective one based on the likely response of the bar to the case's pre-trial merits, rather than on the judge's subjective opinion of the merits." *Lewis* v. *Coughlin*, 801 F. 2d, at 575.

the outset, it is doubtful that counsel anticipated a similar risk in enforcing a decree if plaintiff was successful in having one entered. In any event, the District Court did not specifically identify any new and novel issues, and we fail to discern any, that emerged in the long process of enforcing the court decree in accordance with its terms. And whether the Commonwealth of Pennsylvania was a substantial opponent or whether it tried to circumvent the decree has little or nothing to do with whether the there was a real risk of not persuading the District Court to enforce its own decree. The matter may have been difficult, wearing, and time consuming, but that kind of effort has been recognized in the lodestar award.

Second, if it be assumed that this is one of the exceptional cases in which enhancement for assuming the risk of nonpayment is justified, we conclude that doubling the lodestar for certain phases of the work was excessive. We have alluded to the uncertainties involved in determining the risk of not prevailing and the burdensome nature of fee litigation. We deem it desirable and an appropriate application of the statute to hold that if the trial court specifically finds that there was a real risk-of-not-prevailing issue in the case, an upward adjustment of the lodestar may be made, but, as a general rule, in an amount no more than one-third of the lodestar. Any additional adjustment would require the most exacting justification. This limitation will at once protect against windfalls for attorneys and act as some deterrence against bringing suits in which the the attorney believes there is less than a 50–50 chance of prevailing. Riskier suits may be brought, and if won, a reasonable lodestar may be awarded, but risk enhancement will be limited to one-third of the lodestar, if awarded at all. Here, even assuming an adjustment for risk was justified, the multiplier employed was excessive.

Third, whatever the risk of winning or losing in a specific case might be, a fee award should be informed by the statutory purpose of making it possible for poor clients with good claims to secure competent help. Before adjusting for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market.[12] Here, there were no such findings.

Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

For the reasons explained by the dissent I conclude that Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions such as that of the Clean Air Act, 42 U. S. C. § 7604(d), and the Civil Rights Attorney's Fees Awards Act, 42 U. S. C. § 1988. I also agree that compensation for contingency must be based on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the "riskiness" of any particular case. But in my view the plurality is also correct in holding that the "novelty and difficulty of the issues presented, and . . . the potential for protracted litigation," *ante*, at 726, are factors adequately reflected in the lodestar, and that the District Court erred in employing a risk multiplier in the circumstances of this case.

The private market commonly compensates for contingency through arrangements in which the attorney receives a percentage of the damages awarded to the plaintiff. In most fee-shifting cases, however, the private market model of contingency compensation will provide very little guidance. See *Riverside* v. *Rivera*, 477 U. S. 561, 573–576 (1986). Thus it is unsurprising that when courts have enhanced fee awards to compensate for risk, "[p]inpointing the degree of risk [has been] one of the most subjective and difficult components of the fee computation process, and one which [has been] apt to lead to imprecision in the final award." 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees, ¶ 16.04 [c] [i], p. 16-88 (1986). Although the dissent suggests a method of calculating compensation for contingency that is theoretically more satisfying than the practice of speculating on the riskiness of each case, the dissent does not explain how the theory should be put into practice. For example, how should a court translate the extra economic risk endured by smaller firms, see *post*, at 750-751, or by firms that take unpopular cases, see *post*, at 751, n. 15, into a percentage enhancement?

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[12] "[A]n attorney's fee award should be only as large as necessary to attract competent counsel" and "one relevant factor bearing on high-risk is whether other counsel had declined to take the case because there was little or no prospect of earning a fee." *Lewis* v. *Coughlin*, *supra*, at 576.

Moreover, although the dissent offers no defense of this method of compensating for risk, it leaves the door open for "extra enhancement" for "exceptional cases" that pose great "'legal' risk." *Post*, at 751-752. The "extra enhancement" presumably would be calculated based on the likelihood at the time the litigation was commenced that the particular legal claims raised by the prevailing party would have been rejected by the court. This type of enhancement clearly is subject to the many difficulties described by the plurality. *Ante*, at 721-723. The dissent suggests that the plurality's objections "lose much of their force" because the cases in which "extra enhancement" is granted will be rare. *Post*, at 752, n. 16. But, an arbitrary or unjust result is no less so for its rarity. Furthermore, the difficulties created by this type of enhancement will arise not only when the enhancement is granted, but also whenever it is sought.

To be "reasonable," the method for calculating a fee award must be not merely justifiable in theory but also objective and nonarbitrary in practice. Moreover, if the concept of treating contingency cases as a class is to be more than symbolic, a court's determination of how the market in a community compensates for contingency should not vary significantly from one case to the next. I agree with the plurality that without guidance as to the trial court's exercise of discretion, adjustment for risk could result in "severe difficulties and possible inequities." *Ante*, at 728. In my view, certain constraints on a court's discretion in setting attorney's fees are appropriate.

First, district courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market. Haphazard and widely divergent compensation for risk can be avoided only if contingency cases are treated as a class; and contingency cases can be treated as a class only if courts strive for consistency from one fee determination to the next. Determinations involving different markets should also comport with each other. Thus, if a fee applicant attempts to prove that the relevant market provides greater compensation for contingency than the markets involved in previous cases, the applicant should be able to point to differences in the markets that would justify the different rates of compensation.

Second, at all times the fee applicant bears the burden of proving the degree to which the relevant market compensates for contingency. See *Blum* v. *Stenson*, 465 U. S. 886, 898 (1984) ("The burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant"); *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983) ("Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates"). I would also hold that a court may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel. I agree with the plurality that no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party "would have faced substantial difficulties in finding counsel in the local or other relevant market." *Ante*, at 731.

Finally, a court should not award any enhancement based on "legal" risks or risks peculiar to the case. The lodestar—"the product of reasonable hours times a reasonable rate," *Hensley* v. *Eckerhart*, *supra*, at 434—is flexible enough to account for great variation in the nature of the work performed in, and the challenges presented by, different cases. "The novelty and complexity of the issues" raised in a case "presumably [would be] fully reflected in the number of billable hours recorded by counsel." *Blum*, 465 U. S., at 898. The same can be said for most other problems posed by the litigation, such as the tenacity of the defendant. The "special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." *Ibid.* Thus it is presumed that when counsel demonstrates considerable ability in overcoming unusual difficulties that have arisen in a case, counsel will be compensated for those accomplishments by means of an appropriate hourly rate multiplied by the hours expended.

Based on the above guidelines, the enhancement for risk awarded by the District Court in this case must be reversed. The enhancement is not supported by any findings of fact concerning the degree to which contingency is compensated in the relevant market. Neither the findings nor the evidence indicate that the large enhancements in this case were necessary to attract competent counsel in the relevant community. Moreover, it is clear that the District Court based the enhancement on "legal" risks and risks unique to the case. The considerations used by the District Court to justify the enhancement—the "new and novel issues" raised by the case, and the stubbornness of the defendants, 581 F. Supp. 1412, 1431 (1984)—should already be reflected in the number of hours expended and the hourly rate, and cannot be used again to increase the fee award.

Accordingly, I concur in Parts I, II, and III–A of the plurality and concur in the judgment reversing the judgment of the Court of Appeals.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

In enacting fee-shifting statutes, Congress stressed that the fee awarded must be "adequate to attract competent counsel, but . . . not produce windfalls to attorneys." S. Rep. No. 94-1011, p. 6 (1976). Today, a plurality of the Court ignores the fact that a fee that may be appropriate in amount when paid promptly and regardless of the outcome of the case, may be inadequate and inappropriate when its payment is contingent upon winning the case. By not allowing an upward adjustment for a case taken on a contingent basis, the plurality undermines the basic purpose of statutory attorney fees—ensuring that "private citizens . . . have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." *Id.*, at 2.[1]

I

A

In the private market, lawyers charge a premium when their entire fee is contingent on winning. The Canons of Professional Ethics of the American Bar Association, as first promulgated in 1908, recognized that "[i]n determining the amount of the fee, it is proper to consider . . . (5) the contingency or the certainty of the compensation." Canons of Ethics § 12, 33 A. B. A. Rep. 575, 578 (1908). The ABA Model Code of Professional Responsibility, originally promulgated in 1969 and subsequently adopted by nearly every State, see *Nix* v. *Whiteside*, 475 U. S. 157, 167, n. 4 (1986), likewise provides that one of the "[f]actors to be considered" in determining a reasonable fee is "[w]hether the fee is fixed or contingent." Model Code of Professional Responsibility, DR 2-106(B)(8) (1980). The ABA's most recently formulated ethical standards, the ABA Model Rules of Professional Conduct, adopted in 1983, continue to reflect a consensus among lawyers that "whether the fee is fixed or contingent" is one of "[t]he factors to be considered in determining the reasonableness of a fee." Model Rule 1.5(a) and 1.5(a)(8).

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[1] The concurrence recognizes that Congress did not intend to foreclose enhancements for contingency in the setting of reasonable attorney's fees. See *ante*, at 731. The plurality also recognizes, after a fashion, that fee-shifting statutes might be "construed to permit supplementing the lodestar in appropriate cases by paying counsel for assuming the risk of nonpayment." See *ante*, at 728. Neither opinion, however, follows through on its analysis by remanding the case to the District Court for application of the proper standards.

The premium added for contingency compensates for the *risk* of nonpayment if the suit does not succeed and for the *delay* in payment until the end of the litigation—factors not faced by a lawyer paid promptly as litigation progresses. See Clermont & Currivan, Improving on the Contingent Fee, 63 Cornell L. Rev. 529, 556–557, 561–566 (1978); Schwartz & Mitchell, An Economic Analysis of the Contingent Fee in Personal-Injury Litigation, 22 Stan. L. Rev. 1125, 1150–1154 (1970); F. MacKinnon, Contingent Fees for Legal Services 28, 62 (1964). All else being equal, attorneys naturally will prefer cases where they will be paid regardless of the outcome, rather than cases where they will be paid only if they win. Cases of the latter type are inherently riskier and an attorney properly may expect greater compensation for their successful prosecution. See *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161, 168 (CA3 1973) ("'No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success'"), quoting *Cherner* v. *Transitron Electronic Corp.*, 221 F. Supp. 55, 61 (Mass. 1963); *Wildman* v. *Lerner Stores Corp.*, 771 F. 2d 605, 612 (CA1 1985) (significant difference between a "case taken on a full retainer and a case in which an attorney spends many hours over a period of months or years with no assurance of any pay if the suit is unsuccessful"). See also E. Larson, Federal Court Awards of Attorney's Fees 224–225 (1981).

In the private market, the premium for contingency usually is recouped by basing the fee on a percentage of the damages recovered. The premium also could be computed as part of an hourly rate that the lawyer bills after the litigation succeeds. See Clermont & Currivan, 63 Cornell L. Rev., at 546–547, 567; See, An Alternative to the Contingent Fee, 1984 Utah L. Rev. 485, 499–503. Under either approach, the market-based fee or hourly rate that is contingent on success is necessarily higher than the hourly rate charged when payment is current and certain. This fee enhancement ensures that accepting cases on a contingent basis remains an economically attractive and feasible enterprise for lawyers. See generally MacKinnon, at 3–6.

B

In directing courts to award a "reasonable" attorney's fee to a litigant who vindicates various statutory rights, *e. g.*, 42 U. S. C. § 7604(d) (Clean Air Act), Congress made clear that the winning lawyer should be paid at a rate that is basically competitive with what the lawyer is able to earn in other cases. Congress' purpose—extensively described in the legislative history of the Civil Rights Attorney's Fees Awards Act, 42 U. S. C. § 1988, but fully applicable to statutes that protect the environment, see *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 691–692 (1983)—was to encourage the enforcement of federal law through lawsuits filed by private persons. Congress found that the market itself would not provide an adequate supply of interested lawyers because many potential plaintiffs lacked sufficient funds to hire such lawyers. See H. R. Rep. No. 94–1558, p. 1 (1976); S. Rep. No. 94–1011, at 2. Thus, fee awards were considered to be "an essential remedy" in order to encourage enforcement of the law. *Ibid.* And unless the fee reimbursement was "full and complete," the statutory rights would be meaningless because they would remain largely unenforced. H. R. Rep. No. 94–1558, at 1. See also Note, Promoting The Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 Colum. L. Rev. 346, 350–351, 372 (1980); Berger, Court Awarded Attorney's Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 306–310 (1977).

Congress determined that the public would be best served by the award of fees similar to what "is traditional with attorneys compensated by a fee-paying client." S. Rep. No. 94-1011, at 6. "It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." *Ibid.* See also H. R. Rep. No. 94-1558, at 9. Thus, in *Blum* v. *Stenson*, 465 U. S. 886 (1984), the Court emphasized: "The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community." *Id.*, at 895.

Congress found that a broad variety of factors go into the computation of a "reasonable" attorney's fee. One such consideration is the contingency that the attorney will be paid only if he wins the case. Three of the four major cases cited as examples of "the appropriate standards . . . correctly applied," S. Rep. No. 94-1011, at 6—and noted by this Court in *Blum* v. *Stenson*, 465 U. S., at 895, 897, n. 13—mentioned this risk as a factor for a court to weigh. See *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 718 (CA5 1974);[2] *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680, 685–686

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[2] In *Johnson* v. *Georgia Highway Express, Inc.*, the court essentially adopted the factors that the ABA Model Code of Professional Responsibility DR 2-106(B) sets forth as guidelines for determining the size of an appropriate attorney's fee, including "[w]hether the fee is fixed or contingent." 488 F. 2d, at 718 (emphasis omitted). The other factors cited by the court included: the time and labor required for the case, the novelty and difficulty of the questions, the skill required to perform the legal service properly, the preclusion of other employment, the customary fee, time limitations imposed by the client, the experience of the attorneys, the undesirability of the case, the nature of the relationship with the client, and

(ND Cal. 1974), aff'd, 550 F. 2d 464 (CA9 1977), rev'd on other grounds, 436 U. S. 547 (1978); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483, 486 (WDNC 1975). In the *Stanford* case, the court expressly increased the fee award for the contingent nature of the attorneys' work, noting that such an increase "parallel[s] the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed-fee work." 64 F. R. D., at 685. The court explained: "From the public's standpoint, the contingent fee helps equalize the access of rich, middle-class, and poor individuals to the courts by making attorney decisions concerning representation turn on an action's merits rather than on the size of a client's income." *Ibid.* Thus, contrary to the plurality's assertion, see *ante*, at 723–724, Congress envisioned that district courts would take the fact of contingency into account when calculating a reasonable attorney's fee so that the resulting fee would be equivalent to prevailing market rates.[3]

As courts have gained more experience with fee calculations, many have begun to utilize as a "lodestar" the reasonable hours worked multiplied by a reasonable hourly rate. See *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F. 2d, at 167–168; *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983) (approving use of the lodestar approach). The lodestar, however, was designed

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awards in similar cases. *Id.*, at 717–719. Many of these factors can be included within the "lodestar," in which the reasonable hours worked are multiplied by a reasonable hourly rate. See *Blum* v. *Stenson*, 465 U. S., at 898–899.

[3] Bills have been introduced in Congress to prohibit "bonuses or multipliers," including adjustments for the risk of nonrecovery, where a suit is brought against the United States, a State, or a local government. See H. R. 5757, 98th Cong., 2d Sess., §§ 6(a)(1) and (2) (1984); S. 2802, 98th Cong., 2d Sess., §§ 6(a)(1) and (2) (1984); H. R. 3181, 99th Cong., 1st Sess., §§ 6(a)(1) and (2) (1985); S. 1580, 99th Cong., 1st Sess., §§ 6(a)(1) and (2) (1985). So far these efforts to limit recovery of attorney's fees have been unavailing.

to simplify, not to circumvent, application of the *Johnson* factors where appropriate. See *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 400, 641 F. 2d 880, 890 (1980) (en banc); Berger, 126 U. Pa. L. Rev., at 286–287. Thus, a statutory fee cannot be computed solely by reference to rates charged by corporate firms, which obtain many payments from their clients through monthly billings.[4] Rather, in order to arrive at a "reasonable" attorney's fee, a court must incorporate a premium for the risk of nonrecovery, for the delay in payment, and for any economic risks aggravated by the contingency of payment, at a level similar to the premium incorporated in market rates. The risk premium can be reflected in the hourly rate that goes into the lodestar calculation, or, if the hourly rate does not include consideration of risk, in an enhancement of the lodestar. See *Blum* v. *Stenson*, 465 U. S., at 903 (concurring opinion). Under either approach, adding a premium simply brings the fee up to the "reasonable" level contemplated by Congress. See 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees, ¶ 16.04, p. 16–84 (1986) ("The increase in the fee to account for contingency . . . is part of the fine tuning which courts must do to make a fee reflect the true market value of an attorney's efforts").[5]

An adjustment for contingency is necessary if statutory fees are to be competitive with the private market and if competent lawyers are to be attracted in their private practice to prosecute statutory violations. See The Commitee on Legal Assistance Committee Report on Counsel Fees in Public Interest Litigation, 39 Record of N. Y. C. B. A. 300, 317

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[4] Lawyers who are paid on an hourly basis, of course, face some risk of nonpayment, because not all hours worked can be billed. The hourly rate charged may reflect this. See *Murray* v. *Weinberger*, 239 U. S. App. D. C. 264, 272, 741 F. 2d 1423, 1431 (1984).

[5] I therefore have little quarrel with the plurality's statement that "[n]either the Clean Air Act nor § 1988 expressly provides for using the risk of loss as an independent basis for increasing *an otherwise reasonable fee.*" *Ante*, at 723 (emphasis added). The difficulty is that, on purely economic terms, a statutory attorney's fee is *not* "otherwise reasonable" if it fails to include some premium for the contingency in payment.

(1984). This is simply the law of supply and demand. If lawyers can earn substantially higher pay from other cases in the private sector, they will tend either to reject statutory-enforcement cases or they effectively will be penalized for taking such cases. See Brief for Twelve Small Private Civil Rights Law Firms as *Amici Curiae* 6–29 (describing financial difficulties in depending on contingency cases with statutory attorney's fees); see also *Darden* v. *Illinois Bell Tel. Co.*, 797 F. 2d 497, 505 (CA7 1986) (concurring opinion) ("Unless fees under § 1988 are enhanced to take account of the risk of losing—whether through a multiplier or by the contingent fee device when the stakes are high—fees will be systematically too small"). Allowing adjustments for contingency similar to that given to attorneys in the private market thus appropriately "'enable[s] counsel to accept apparently just causes without awaiting sure winners.'" *Yates* v. *Mobile County Personnel Bd.*, 719 F. 2d 1530, 1533 (CA11 1983), quoting *Jones* v. *Diamond*, 636 F. 2d 1364, 1382 (CA5 1981).

Not surprisingly, the Courts of Appeals are in agreement that adjustments for the risk of nonrecovery are appropriate in most circumstances.[6] And while this Court, in *Blum* v.

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[6] After the Court left the issue open in *Blum* v. *Stenson*, 465 U. S., at 901, n. 17, almost all Courts of Appeals have upheld enhancements for contingency or have ruled that such enhancements are allowable in appropriate circumstances. See, *e. g.*, *Wildman* v. *Lerner Stores Corp.*, 771 F. 2d 605, 613 (CA1 1985); *Lewis* v. *Coughlin*, 801 F. 2d 570, 573–574 (CA2 1986); *Durett* v. *Cohen*, 790 F. 2d 360, 364, and n. 3 (CA3 1986); *Vaughns* v. *Board of Ed. of Prince George's County*, 770 F. 2d 1244, 1246 (CA4 1985); *Sims* v. *Jefferson Downs Racing Assn., Inc.*, 778 F. 2d 1068, 1084 (CA5 1985); *Kelley* v. *Metropolitan County Bd. of Ed.*, 773 F. 2d 677, 683, 686 (CA6 1985) (en banc), cert. denied, 474 U. S. 1083 (1986); *Moore* v. *Des Moines*, 766 F. 2d 343, 346 (CA8 1985), cert. denied, 474 U. S. 1060 (1986); *Planned Parenthood* v. *Arizona*, 789 F. 2d 1348, 1353–1354 (CA9 1986); *Ramos* v. *Lamm*, 713 F. 2d 546, 558 (CA10 1983), cited with approval in *Jordan* v. *Heckler*, 744 F. 2d 1397, 1401–1402 (CA10 1984); *Jones* v. *Central Soya Co.*, 748 F. 2d 586, 591 (CA11 1984); *Crumbaker* v. *Merit Systems Protection Board*, 781 F. 2d 191, 196 (CA Fed. 1986).

The Courts of Appeals for the District of Columbia and the Seventh Circuits have questioned the propriety of risk enhancement. See *Laffey* v.

Stenson, 465 U. S., at 901, n. 17, left open the question of contingency adjustments, the Court also made clear that Congress intended statutory fees to be competitive with the private market for lawyers' services. *Id.*, at 895. Thus, competitive awards, rather than being "the kind of 'windfall profits' [Congress] expressly intended to prohibit," *ibid.*, are, instead, the way to implement congressional intent.

C

If it were the law of the land, the plurality's decision, in Part IV of its opinion, to foreclose any compensation for the risk of nonrecovery would reduce statutory fees below the market rate and inevitably would obstruct the vindication of federal rights.[7] Because fewer lawyers would be attracted to the work, some persons who now are able to bring valid claims would be unable to find a lawyer. They likely would be persons of modest means who could not afford to augment their lawyer's fee to what the market would charge—precisely the persons Congress sought to assist. Even plaintiffs who somehow could manage to attract lawyers at below the

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Northwest Airlines, Inc., 241 U. S. App. D. C. 11, 36, 746 F. 2d 4, 29 (1984), cert. denied, 472 U. S. 1021 (1985); *McKinnon* v. *Berwyn*, 750 F. 2d 1383, 1392–1393 (CA7 1984). The Court repeats the analyses of these cases in some detail. See *ante*, at 719–720, and n. 6. Panels in each of those two Circuits, however, have indicated that enhancements would be appropriate in certain situations. See *Murray* v. *Weinberger*, 239 U. S. App. D. C. 264, 272–273, 741 F. 2d 1423, 1431–1432 (1984); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 776 F. 2d 646, 661 (CA7 1985). Moreover, as the plurality does in this case, the courts in both *Laffey* and *McKinnon* misconstrued the nature and purpose of enhancements for contingency.

[7] The plurality's conclusion in Part IV of its opinion is, of course, not the governing law because five Members of this Court (those who are parties to this opinion and JUSTICE O'CONNOR) believe that an enhancement for contingency is appropriate in specified cases. See *ante*, at 731 (concurrence) ("I conclude that Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions such as that of the Clean Air Act, 42 U. S. C. § 7604(d), and the Civil Rights Attorney's Fees Awards Act, 42 U. S. C. § 1988").

market rate usually would get what they pay for: lawyers who are less than fully employed or who are less capable. Without compensation for contingency, "[b]usy and successful attorneys simply could not afford to accept contingent employment . . . . Such an arrangement would ill serve policies of enormous national importance." *Yates* v. *Mobile County Personnel Bd.*, 719 F. 2d, at 1534. As Congress recognized, effective enforcement of complex cases requires the services of experienced attorneys. Such lawyers are less likely to be underemployed. They therefore will tend to demand rates approaching what can be obtained in the private sector. Berger, at 314–315.

The plurality offers assurances that enforcement would not end completely because public-interest groups would still take these cases. See *ante*, at 726. In effect, the plurality would place the entire burden of injunctive actions and modest damages claims on the shoulders of the public-interest bar. But it is unrealistic to think that 600 public-interest lawyers in 90 public-interest law centers around the country would be able to pick up the slack from the rest of the bar, with its approximately 400,000 lawyers. "The services of the *pro bono* bar, which is concentrated in the eastern urban centers, simply [are] not available to most people." Berger, at 313 (footnote omitted).

Significantly, the plurality's opinion would validate payment of public-interest lawyers at substantially less than what would be competitive with the private market. In *Blum*, however, this Court made clear that nonprofit legal-aid organizations should receive no less in fee awards than the hourly rate set by the private market for an attorney's services. 465 U. S., at 895.[8] See also *New York Gaslight Club, Inc.* v.

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[8] A nonprofit, public-interest law firm cannot obtain additional revenue by charging its clients for services (other than expenses) and still retain its tax-exempt status as a charitable organization. See 26 CFR § 1.501(c)(3)–1 (1987); Rev. Proc. 71–39, § 3.02, 1971–2 Cum. Bull. 575; Rev. Proc. 75–13, 1975–1 Cum. Bull. 662; Rev. Rul. 75–74, 1975–1 Cum. Bull. 152; Rev. Rul.

Carey, 447 U. S. 54, 70, n. 9 (1980). The plurality today attempts to accomplish indirectly what the Court refused to do directly in *Blum*.

The plurality further defends its approach by asserting that plaintiffs bringing large damages claims could continue to attract private lawyers. See *ante*, at 726. But those plaintiffs might be able to hire counsel in any event through private contingency arrangements. Congress provided for fee shifting precisely because it concluded that too many plaintiffs would be unable to obtain representation in this manner. The plurality's solution would slight actions that seek injunctive relief or relatively small damages awards, on which the vindication of many federal rights depends. See *Riverside* v. *Rivera*, 477 U. S. 561 (1986).

II

In view of Congress' desire that statutory fees be competitive with the private market, the plurality needs a compelling reason in order to reject the market approach for determining what constitutes a reasonable fee. Although the plurality suggests some reasons, its objections are all based on a fundamental mischaracterization of the enhancement for contingency in awarding attorney's fees. The Court states that the issue before it is whether an attorney "may be awarded separate compensation for assuming the risk of not being paid," and explains that "[t]hat risk is measured by the risk of losing rather than winning and depends on how unsettled the applicable law is with respect to the issues posed by the case and by how likely it is that the facts could be decided against

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75-75, 1975-1 Cum. Bull. 154. Acceptance of statutory fee awards within limits, however, does not jeopardize that status. See Rev. Rul. 75-76, 1975-1 Cum. Bull. 154. And public-interest firms generally may not use money they receive from the Federal Government, such as the limited public funding received through the Legal Services Corporation, in cases where fees are available. See 42 U. S. C. § 2996f(b)(1); *Hensley* v. *Eckerhart*, 461 U. S. 424, 446, n. 6 (1983) (opinion concurring in part and dissenting in part).

the complainant." *Ante*, at 715–716. Having framed the issue in this fashion, the Court discovers significant problems in allowing enhancements based on the likelihood of success in particular cases. The Court, for example, says it is disturbed that evaluation of the risk of loss may create a conflict of interest between attorneys and their clients, as both plaintiff and defense attorneys try to characterize their cases in a manner that will increase or decrease attorney's fees, *ante*, at 721–722, and that it is difficult for a court to estimate retroactively a prevailing party's chance of success once a court knows the outcome. *Ante*, at 722. The Court further notes that such enhancements have the perverse result of penalizing defendants with the strongest defenses and causing those defendants to subsidize plaintiffs' attorneys for other unsuccessful actions that they may bring. *Ibid*. This last concern is of great significance to the plurality because it appears to be "[in]consistent with Congress' decision to adopt the rule that only prevailing parties are entitled to fees." *Ante*, at 725. The Court also expresses alarm, echoing the opinion of the Court of Appeals for the District of Columbia Circuit in *Laffey* v. *Northwest Airlines, Inc.*, 241 U. S. App. D. C. 11, 33, 746 F. 2d 4, 26 (1984), cert. denied, 472 U. S. 1021 (1985), that "in theory, there should be no limit on the size of the fee if risk enhancement is permitted, for the less likely the chances of success in a particular case, the more 'entitled' the prevailing party should be to have the fee award reflect acceptance of this risk." *Ante*, at 719; see also *ante*, at 725.

The underlying flaw in all of these objections is that the appropriate enhancement for risk does not depend, in the first instance, on the *degree* of risk presented by a particular case. Enhancement for risk is not designed to equalize the prospective returns among contingent cases with different degrees of merit.[9] Rather, it is designed simply to place contingent employment *as a whole* on roughly the same economic footing as noncontingent practice, in order that such cases receive the equal representation intended by Congress. Enhancement compensates attorneys for the risk of nonpayment associated with contingent employment, a risk that does not exist in noncontingent cases. As discussed above, without the possibility of enhancement for contingency, an attorney, from a simple economic point of view, would prefer noncontingent employment to contingent employment. This is because even contingent cases with the best merit may sometimes fail, because delay in payment is inherent in any contingent arrangement, and because other economic risks may be aggravated by the contingency in payment.[10] Thus, contrary to the plurality's vision of an enhancement that radically increases as a case's chance of success decreases, an enhancement for contingency in ordinary cases will not be based on the relative likelihood of success of a particular case.[11]

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[9] Such equalization is the result under the plurality's view of risk enhancement. Under that view, an attorney who takes relatively weak contingent cases would prevail infrequently, but could expect to receive large

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enhancements. This attorney would thus receive approximately the same compensation as an attorney who takes stronger contingent cases, prevails more often, and accordingly receives smaller enhancements.

[10] See, *e. g.*, *Hensley* v. *Eckerhart*, 461 U. S., at 449 (opinion concurring in part and dissenting in part) ("Courts applying § 1988 must also take account of the time-value of money and the fact that attorneys can never be 100% certain they will win even the best case"); *Crumbaker* v. *Merit Systems Protection Board*, 781 F. 2d, at 197 (argument that no risk enhancement should be allowed, because plaintiff's attorney must have known, on the basis of law and facts in the case, that the defendant could not prevail, is "inane"; case required the best ability of counsel, defendant vigorously contested the case, and no case is certain to prevail).

[11] See Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L. J. 473, 501 (1981) (Leubsdorf) ("A contingency award does not require an inquiry into the likelihood of success in each case"); Note, Attorney Fees and the Contingency Factor Under 42 U. S. C. § 1988: *Blum* v. *Stenson*, 465 U. S. 886 (1984), 64 Ore. L. Rev. 571, 588 (1986) ("[S]tandard contingency adjustment, unrelated to the risks of any particular case, [should be] used in calculating section 1988 attorney's fees").

Indeed, it is ironic that the Court draws as heavily as it does on the article by Professor Leubsdorf, see *ante*, at 721–722—an article on which the Court of Appeals for the District of Columbia Circuit in *Laffey* and the

Once it is recognized that it is the fact of contingency, not the likelihood of success in any particular case, that mandates an increase in an attorney's fee, the frightening difficulties envisioned by the plurality disappear. There is no reason to assume that, in most cases, a court will have to delve into the strengths and weaknesses of a particular case, that potential conflict of interests will arise between attorneys and clients, or that large enhancements disproportionate to the success of a case will be granted. Rather, a court's job simply will be to determine whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment. The Court of Appeals for the First Circuit correctly points out that "it is the actual risks or burdens that are borne by the lawyer or lawyers that determine whether an upward adjustment is called for." *Wildman* v. *Lerner Stores Corp.*, 771 F. 2d, at 613.[12]

Court of Appeals for the Seventh Circuit in *McKinnon* likewise rely. In his article, Professor Leubsdorf clearly sets forth the difficulties that arise when contingency enhancements are based on the relative likelihood of success in particular cases, Leubsdorf, at 482–497—an approach that he terms "the *Lindy-Grinnell* approach" because of two leading cases in the area, *id.*, at 478–482. But Professor Leubsdorf begins his analysis with a recognition that *some* enhancement for contingency is necessary if attorneys are to receive the fair market value of their work. *Id.*, at 480 ("A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases"). Thus, as the professor explains: "Although economic reasoning *justifies* a contingency bonus, it does not by itself explain the *Lindy-Grinnell* approach to calculating the size of the bonus" (first emphasis added). *Ibid.* Professor Leubsdorf subsequently offers alternative approaches for calculating and awarding contingency enhancements. *Id.*, at 501–512.

[12] Thus, contrary to the implication in the Court's opinion, *ante*, at 717–718, the Court of Appeals in *Wildman* did not approve of contingency enhancements based on the likelihood of success in particular cases. Rather, the court *vacated* the multiplier granted by the District Court—which had held, without elaboration, that the contingent nature of the case and the

The American Bar Association sets forth a reasonable approach for determining when, and to what degree, enhancement is appropriate in calculating a statutory attorney's fee. Brief for American Bar Association as *Amicus Curiae* 18–22. A court first must determine whether an attorney has taken a case on a contingent basis. If a client has contracted to pay the "lodestar" fee (*i. e.*, reasonable hours times a reasonable hourly rate), regardless of the outcome of the case, and has paid the attorney on a continuing basis, then the attorney has clearly avoided the risk of nonpayment and enhancement is not appropriate. See, *e. g.*, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy Inc.*, 776 F. 2d 646, 660 (CA7 1985) (plaintiff paid lawyers on a regular hourly basis and therefore "lawyers neither risked noncompensation nor endured a delay before payment"); *Jones* v. *Central Soya Co.*, 748 F. 2d 586, 592 (CA11 1984) (no indication that case was taken on a contingent basis and therefore upward adjustment not appropriate). The court also must determine if an attorney has been able to mitigate the risk of nonpayment in any way. For example, if a client has agreed to pay some portion of the lodestar amount, regardless of the outcome of the case, the attorney has mitigated the risk of loss to some extent, although the percentage of total expenses paid by the client will indicate how much of a mitigating factor this contribution should be considered to be. See, *e. g.*, *Stanford Daily* v. *Zurcher*,

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quality of the attorney's work warranted an enhancement—and remanded the case for the District Court to determine whether an enhancement for contingency was warranted. 771 F. 2d, at 613–614. Among the factors to be considered on remand were: what, if any, payment the attorneys would have received had the suit not been successful; what, if any, costs or expenses the attorneys would have incurred if the case had been lost; the extent to which the attorneys were required to compensate associates and to carry overhead expenses without assurance of compensation; and whether other attorneys refused to take the case because of the risk of nonpayment. *Id.*, at 614. All these factors focus solely on the extent of contingency in payment and not on the likelihood of success based on the law or facts in the particular case.

64 F. R. D., at 686 (client agreed to pay $5,000 retainer and to undertake fundraising effort, but attorneys clearly not guaranteed payment for most of the hours expended). Or, for example, if the attorney has entered into a contingent-fee contract in a suit seeking substantial damages, the attorney again has mitigated the risk to some extent by exchanging the risk of nonpayment for the prospect of compensation greater than the prospective lodestar amount. Even in such cases, of course, a court must still calculate a reasonable attorney's fee to be assessed against the defendant. There is no reason to grant a defendant a "windfall" by excusing payment of attorney's fees simply because a plaintiff has entered into a contingent-fee contract. See, *e. g.*, *Hamner* v. *Rios*, 769 F. 2d 1404, 1408–1410 (CA9 1985); *Sargeant* v. *Sharp*, 579 F. 2d 645, 649 (CA1 1978).

If an attorney and client have been unable to mitigate the risk of nonpayment, then an enhancement for contingency is appropriate. In many cases, a client will be unable to pay for counsel or will be unwilling to assume the risk of liability for attorney's fees, even if the public interest may be significantly aided by the private litigation. Other cases simply will not generate significant funds, even if they are successful. Many actions seek only declaratory or injunctive relief, many are hampered by immunity doctrines and special defenses available to the defendants, and many will generate only small awards. See H. R. Rep. No. 94–1558, at 9; *Riverside* v. *Rivera*, 477 U. S. 561 (1986); see also Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L. J. 651, 676.

As the American Bar Association points out, a court must not only determine whether an attorney has been able to mitigate the economic risk of nonpayment, it must also determine whether specific aspects of the case have aggravated that economic risk. Brief for American Bar Association as *Amicus Curiae* 21–22. The enhancement for contingency compensates the attorney primarily for the risk of spending numerous hours, indeed often years, on a case, with the knowledge that no payment may ever be recovered. Other aspects of a case, however, can aggravate the economic risk inherent in contingency payments.

First, although the Court treats delay in payment as independent of the risk of nonpayment, see *ante*, at 716, such delay is an integral aspect of contingency payments for which compensation is appropriate.[13] Delay in payment causes cash-flow problems and deprives an attorney of the use of money, thus magnifying the economic risk associated with the uncertainty of payment. See, *e. g.*, *Copeland* v. *Marshall*, 205 U. S. App. D. C., at 403, 641 F. 2d, at 893; Brief for Twelve Small Private Civil Rights Law Firms as *Amici Curiae* 6–31 (describing difficulties related to delayed payments). Indeed, some types of litigation, such as cases seeking institutional reform or involving complex environmental issues, have a potential for such significant delay that attorneys must be assured of an appropriate enhancement in order to offset the financial disincentive to taking such cases.

Second, a case may present greater economic risks because of a particular attorney's circumstances. For example, contingent litigation may pose greater risks to a small firm or a solo practitioner because the risk of nonpayment may not be offset so easily by the presence of paying work, and because such paying work may have to be turned away once a contingent case is accepted.[14] Conversely, where responsibility for a case is shared among several firms, the relative economic risk borne by each firm may be diminished. See, *e. g.*, *In re Fine Paper Antitrust Litigation*, 98 F. R. D. 48, 84 (ED Pa. 1983), aff'd in part and rev'd in part, 751 F. 2d 562 (CA3 1984).[15]

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[13] Although the Court errs in not viewing delay as an integral component of contingency, it is gratifying to note that the Court does "not suggest . . . that adjustments for delay are inconsistent with the typical fee-shifting statute." *Ante*, at 716.

[14] See, *e. g.*, *Brewer* v. *Southern Union Co.*, 607 F. Supp. 1511, 1532 (Colo. 1984) (small firm); *Uzzell* v. *Friday*, 618 F. Supp. 1222, 1227 (MDNC 1985) (solo practitioner). A case to which a substantial percentage of an attorney's law practice is devoted, see, *e. g.*, *Craik* v. *Minnesota State University Bd.*, 738 F. 2d 348, 350–351 (CA8 1984), or in which additional personnel must be hired without assurance of compensation, may also be riskier than an ordinary contingent case.

In most cases in which an enhancement for contingency is sought, therefore, a court will not need to inquire into the relative likelihood of success of the particular case before it. It is possible, however, that in a few, unusual cases the likelihood of success may appropriately be taken into account. Sometimes, the "legal" risks facing a case may be so apparent and significant that they will constitute an economic disincentive independent of that created by the basic contingency in payment. When the result achieved in such a case is significant and of broad public interest, an additional enhancement is justified in order to attract attorneys to take such cases, which otherwise might suffer from lack of representation. Extra enhancement for such cases, however, should be awarded in exceptional cases only. In most cases where the "legal" risks are high, and the case therefore novel and difficult, attorneys may be expected to spend a greater number of hours preparing and litigating the case. Courts should consider this seriously in determining the number of "reasonable" hours to be incorporated in the lodestar and should be careful not to reduce unduly the number of hours in a novel and difficult case. If a court finds, however, that an attorney has taken a significant legal risk in a case of important public interest, and that this risk has not been compensated adequately by the court in the number of hours represented in the lodestar, the court may then grant an enhancement above that awarded for the basic contingency risk. In such a case, the court must make detailed findings regarding the particular legal risks that were apparent at the outset of the litigation and the importance of the result obtained—findings that would justify the additional enhancement.

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[15] Economic risks might also be increased if a case foreclosed participation in otherwise available business because of potential conflicts of interest, or if the case was so unpopular as to risk loss of other business. See, *e. g.*, *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d, at 719 (one of the factors to consider is the "'undesirability' of the case" because of the effect it may have on obtaining other business) (emphasis omitted); *York* v. *Alabama State Board of Education*, 631 F. Supp. 78, 85 (MD Ala. 1986) (successful plaintiffs' civil rights lawyers often not hired for other types of sophisticated federal litigation). Although these circumstances probably will exist in comparatively few cases, attorneys should nonetheless be compensated if they have undertaken representation despite such risks.

Almost all of the plurality's objections to enhancements for contingency become irrelevant once such enhancement is seen, as a general matter, to be completely independent from the likelihood of success in particular cases. Under the approach outlined above, there is no reason for a court to assess the success of a case retroactively, no cause for a conflict of interest to arise between attorney and client, and no possibility of a grant of huge multipliers simply because the odds against a case were significant.[16] The only remaining objection is that awarding higher fees to lawyers who accept contingent cases gives such lawyers the economic stability with which to bring other, possibly unsuccessful, lawsuits. In the plurality's view, this contravenes Congress' intent to award attorney's fees only to prevailing parties. *Ante*, at 725. But this objection must ultimately fail. The fact is that an attorney still recovers fees *only* when that attorney's client prevails in a lawsuit. If the attorney represents a client in an unsuccessful contingent litigation, no fees are recovered. That the attorney may use the fees obtained in the successful contingency lawsuit to bring other lawsuits—some of which will not be successful—does not contravene in any way Congress' mandate that fees be awarded solely to prevailing parties.[17] There is certainly no indication in the legislative history of § 1988 that Congress' restriction of attorney's fees to prevailing parties was intended to deny reasonable fees to attorneys who would use their income to subsidize unsuccessful litigation. Indeed, that would be contrary to Congress' intent that attorneys bringing statutory violation cases be compensated in a manner similar to that by which attorneys in the private market are compensated. As in the private market, what a successful attorney does with earned fees is the attorney's own business.

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[16] The cases in which an extra enhancement is granted for the low likelihood of success and for the importance of the result achieved will be sufficiently rare that the plurality's concerns lose much of their force. Moreover, those cases will tend to be the important test cases that should be encouraged through an award of attorney's fees.

The basic objective for courts to keep in mind in awarding enhancements for risk is that a "reasonable attorney's fee" should aim to be competitive with the private market, even if it is not possible to reflect that market perfectly. Thus, an enhancement for contingency, whether calculated as an increase in the reasonable hourly rate used to arrive at the lodestar or added to the lodestar as a bonus or a multiplier, is not designed to be a "windfall" for the attorney of the prevailing party. Rather, it is designed to ensure that lawyers who take cases on contingent bases are properly compensated for the risks inherent in such cases. Vindication of the statutory rights passed by Congress depends on the continued availability and willingness of highly skilled lawyers to take cases for which they will receive a statutory attorney's fee. In setting such fees, courts must ensure that the fees are "reasonable"—*i. e.*, that the fees properly compensate an attorney for the risks assumed.

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[17] The justification for a contingency premium can be explained either as an inducement to persuade an attorney to invest his time in a matter that may be unproductive—even a lawyer who has all the hourly fee work that he can handle may be willing to accept a contingency if he concludes that the value of the potential premium justifies the risk of nonpayment—or as a means of providing a level of compensation that will offset the losses on other cases that fail. Either explanation is simply a reflection of how the private market compensates for contingency. See, *e. g.*, Berger, Court Awarded Attorney's Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 325 (1977).

III

Respondent Delaware Valley "clearly prevailed in attaining what [it] sought and [won results that] would not have occurred without [its] efforts." 581 F. Supp. 1412, 1420 (ED Pa. 1984). As a prevailing party, Delaware Valley is entitled to a statutory fee award. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968).

This case also appears to be a candidate for a contingency adjustment because the plaintiffs' lawyers apparently accepted the case on the expectation that they would be paid only if their clients prevailed. The District Court, however, explained its award of a multiplier in three phases of the litigation in the following brief statement:

> "The contingent nature of plaintiffs' success has been apparent throughout this litigation. Plaintiffs entered the litigation against the U. S. Government and the Commonwealth of Pennsylvania. The case involved new and novel issues, the resolution of which had little or no precedent. Commencing in Phase IV and continuing up until the present, plaintiffs have had to defend their rights under the consent decree due to numerous attempts by defendants and others to overturn or circumvent this court's Orders." 581 F. Supp., at 1431.

I conclude that we should vacate the award and remand the case to the District Court for further findings. First, as I have explained, the District Court should determine whether respondent's attorneys took this case on a contingent basis, whether they were able to mitigate the risks of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment. The court then should arrive at an enhancement for risk that parallels, as closely as possible, the premium for contingency that exists in prevailing market rates. The court should thereby arrive at an enhancement that appropriately compensates the attorneys for the risks assumed.

Second, the court might also determine whether this case deserves an extra enhancement because of the significant legal risks apparent at the outset of the litigation and because of the importance of the case. I would note, however, that respondent's attorneys began this litigation in order to enforce a consent decree—a situation that does not usually entail difficult legal risks. If the District Court were to believe that the case nonetheless did involve significant legal risks at the outset of the litigation, it would make specific findings to that effect and would not simply state that the "case involved new and novel issues." *Ibid.*[18]

The plurality's *per se* ruling, in Part IV of its opinion, against enhancements for contingency contravenes Congress' express intent that statutory attorney's fees should be equivalent to prevailing market rates so that highly skilled lawyers will be available to vindicate the statutory rights conferred by Congress. At the least, however, the majority of this Court leaves open the opportunity for district courts to award enhancements for contingency in selected cases.

I respectfully dissent.

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[18] Both the District Court and the Court of Appeals relied heavily on the fact that respondent faced serious and persistent opposition in this case. See 581 F. Supp., at 1431; 762 F. 2d 272, 281 (1985). The fact that an attorney faces strong opposition by a well-funded opponent should certainly be given significant weight by a court. This factor, however, ordinarily becomes relevant in the assessment of the reasonableness of the hours expended by the attorney in preparing and litigating the case. Like the novelty or difficulty of a case, a strong and persistent opponent usually demands a significant increase in the hours devoted to a case. In the few cases in which an extra enhancement is justified for significant legal risks faced at the outset of litigation, a court may take into account as well the perceived strength of the opposition at the outset. A court, however, should grant such extra enhancement only if it determines that the attorneys have not already been adequately compensated through the number of reasonable hours that constitute the lodestar.

GREER, WARDEN *v.* MILLER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 85–2064. Argued April 27, 1987—Decided June 26, 1987

Respondent and two other men (including Randy Williams) were charged with kidnaping, robbery, and murder. Williams entered into a plea agreement and testified at respondent's separate Illinois court trial that each of the men participated in the crime and that each shot the victim. Respondent testified on direct examination that he had taken no part in the crime, but that the other men had come to him after the murder was committed, seeking his advice. At the beginning of respondent's cross-examination, the prosecutor asked him: "Why didn't you tell this story to anybody when you got arrested?" Defense counsel immediately objected and, out of the jury's hearing, requested a mistrial on the ground that the prosecutor's question violated respondent's right to remain silent after arrest. The judge denied the motion, but immediately sustained the objection and instructed the jury to "ignore [the] question, for the time being." The prosecutor did not pursue the issue further, nor did he mention it during his closing argument. The judge's instructions to the jury included a caution to "disregard questions . . . to which objections were sustained." Respondent was convicted, but the Illinois Appellate Court reversed the conviction. The court rejected the State's argument that if the prosecutor's question about respondent's postarrest silence was prohibited by *Doyle* v. *Ohio*, 426 U. S. 610, the error was harmless under the standards of *Chapman* v. *California*, 386 U. S. 18. The Illinois Supreme Court reversed, holding that the prosecutor's improper question did not require reversal of the conviction under the circumstances of this case. Respondent then sought habeas corpus relief in the Federal District Court, which denied the petition. The Court of Appeals reversed, finding that because respondent had received *Miranda* warnings at the time of his arrest, the prosecutor's question violated respondent's constitutional right to a fair trial. The court further held that the error was not harmless beyond a reasonable doubt under *Chapman*.

Held: The prosecutor's question concerning respondent's postarrest silence does not require reversal of the conviction. Pp. 761–767.

(a) No *Doyle* violation occurred in this case. *Doyle* held that permitting the *use* for impeachment purposes of a defendant's silence at the time of arrest and after receiving *Miranda* warnings, which contain an implicit assurance that silence will carry no penalty, violates the Due Process Clause of the Fourteenth Amendment. Here, respondent received the "implicit assurance" of *Miranda* warnings. However, the trial court did not permit the inquiry that *Doyle* forbids. Instead, the court explicitly sustained an objection to the only question that touched upon respondent's postarrest silence. No further questioning or argument with respect to his silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained. The prosecutor was not allowed to undertake impeachment on, or permitted to call attention to, respondent's silence. Pp. 761–765.

(b) The prosecutor's misconduct in attempting to violate the rule of *Doyle* did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. The Illinois Supreme Court's finding, under *Chapman*, that the prosecutor's question was harmless beyond a reasonable doubt indicates that it would find no due process violation under the facts here. The sequence of events—a single question, an immediate objection, and two curative instructions—clearly indicates that the prosecutor's improper question did not violate respondent's due process rights. Moreover, the Illinois Supreme Court's determination that the properly admitted evidence was sufficient to prove respondent's guilt beyond a reasonable doubt further supports the conclusion that there was no due process violation. Pp. 765–767.

789 F. 2d 438, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 767. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 769.

Mark L. Rotert, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *Neil F. Hartigan*, Attorney General, *Roma J. Stewart*, Solicitor General, and *David E. Bindi*, Assistant Attorney General.

Gary R. Peterson argued the cause for respondent. With him on the brief was *Daniel D. Yuhas*.*

**Leon Friedman*, *Vivian O. Berger*, and *Harvey Grossman* filed a brief for the American Civil Liberties Union Foundation et al. as *amicus curiae* urging affirmance.

JUSTICE POWELL delivered the opinion of the Court.

The question before us is whether a prosecutor's question at trial concerning a criminal defendant's postarrest silence requires reversal of the defendant's conviction.

I

In 1980, Neil Gorsuch was kidnaped, robbed, and murdered after leaving a bar in Jacksonville, Illinois. Three men were charged with the crimes: Randy Williams, Clarence Armstrong, and the respondent, Charles Miller. Williams confessed, and later entered into a plea agreement under which most of the charges against him were dropped in return for his testimony at the separate trials of Armstrong and Miller.

At Miller's trial, Williams testified that he, his brother, and Armstrong had met Gorsuch in a tavern on the evening of February 8. Armstrong offered the victim a ride back to his hotel, and the four men left together at about 1:30 a.m. After Williams' brother was dropped off, Armstrong began beating Gorsuch in the back seat of the car. According to Williams' testimony, the group stopped briefly at Williams' parents' home to pick up a shotgun, and the men then drove to the trailer home where Miller was staying. Williams testified that Miller joined the group, and that they then traveled to a bridge on an isolated road. Williams stated that once there each of the three men shot Gorsuch in the head with the shotgun.

Respondent Miller took the stand on his own behalf and told a different story. On direct examination he testified that he had taken no part in the crime, but that Armstrong and Williams had come to the trailer home after the murder was committed seeking Miller's advice. Miller testified that Armstrong confessed that he and Williams had beaten and robbed Gorsuch, and that they had killed him to avoid being identified as the perpetrators.

The prosecutor began his cross-examination of Miller as follows:

> "Q: Mr. Miller, how old are you?
>
> "A: 23.
>
> "Q: Why didn't you tell this story to anybody when you got arrested?" App. 31.

Defense counsel immediately objected. Out of the hearing of the jury, Miller's lawyer requested a mistrial on the ground that the prosecutor's question violated Miller's right to remain silent after arrest. The trial judge denied the motion, but immediately sustained the objection and instructed the jury to "ignore [the] question, for the time being." *Id.*, at 32. The prosecutor did not pursue the issue further, nor did he mention it during his closing argument. At the conclusion of the presentation of evidence, defense counsel did not renew his objection or request an instruction concerning the prosecutor's question. Moreover, the judge specifically instructed the jury to "disregard questions . . . to which objections were sustained." *Id.*, at 47. Miller was convicted of murder, aggravated kidnaping, and robbery, and sentenced to 80 years in prison.

On appeal the State argued that if the prosecutor's question about Miller's postarrest silence was prohibited by this Court's decision in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), the error was harmless under the standards of *Chapman* v. *California*, 386 U. S. 18 (1967).[1] The Illinois Appellate Court rejected the argument and reversed the conviction, concluding that the evidence against Miller "was not so overwhelming as to preclude all reasonable doubts about the effect of the prosecutor's comment." *State* v. *Miller*, 104 Ill. App. 3d 57, 61, 432 N. E. 2d 650, 653–654 (4th Dist. 1982). The

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[1] In *Chapman*, the Court held that even errors of constitutional magnitude may be harmless if it is clear beyond a reasonable doubt that the error did not contribute to the defendant's conviction. 386 U. S., at 24.

Supreme Court of Illinois disagreed and reinstated the trial court's decision. *State* v. *Miller*, 96 Ill. 2d 385, 450 N. E. 2d 322 (1983). The court noted that the prosecutor's question was an isolated comment made in the course of a lengthy trial, that the jury had been instructed to disregard the question, and that the evidence properly admitted was sufficient to establish Miller's guilt beyond a reasonable doubt. *Id.*, at 396, 450 N. E. 2d, at 327. It therefore held that the error did not require reversal of the conviction.

Miller then filed a petition for a writ of habeas corpus in the Federal District Court for the Central District of Illinois. The District Court denied the petition, finding "no possibility that the prosecutor's questioning on post-arrest silence could have contributed to the conviction." App. to Pet. for Cert. C–3. A divided panel of the Court of Appeals for the Seventh Circuit reversed the District Court's decision, *United States ex rel. Miller* v. *Greer*, 772 F. 2d 293 (1985), as did the full court on reargument en banc. *United States ex rel. Miller* v. *Greer*, 789 F. 2d 438 (1986). The en banc court found that because Miller had received *Miranda*[2] warnings at the time of his arrest for the offenses in question, "[t]he prosecutor's reference to Miller's silence at the time of his arrest . . . violated his constitutional right to a fair trial." 789 F. 2d, at 442. The court further held that the error was not harmless beyond a reasonable doubt under *Chapman* v. *California*, *supra*, because "[t]he evidence against Miller was not overwhelming, his story was not implausible, and the trial court's cautionary instruction was insufficient to cure the error." 789 F. 2d, at 447. Three judges dissented, concluding that under the harmless-error standard, "this fifteen-second colloquy, alleviated by the trial judge's immediately sustaining the defendant's objection and instructing the jury to ignore the prosecutor's improper question and by a threshold jury instruction to disregard questions to which objections were sustained, did not affect the verdict." *Id.*, at

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[2] *Miranda* v. *Arizona*, 384 U. S. 436, 467–473 (1966).

448 (Cummings, J., joined by Wood and Coffey, JJ., dissenting) (footnotes omitted; record reference omitted). Judge Easterbrook also dissented. In his view, the harmless-error standard of *Chapman* is too stringent to be applied to this case for a number of reasons: the rule of *Doyle* is prophylactic rather than innocence-protecting; the issue is presented on collateral, rather than on direct, review; the error in this case could have been cured more fully had defense counsel so requested at trial; and the violation should be viewed as prosecutorial misconduct that requires reversal only if it rendered the trial fundamentally unfair. 789 F. 2d, at 448–457.

We granted certiorari to review the Court of Appeals' determination that the prosecutor's question about the criminal defendant's postarrest silence requires reversal of the conviction in this case. 479 U. S. 983 (1986).[3] We disagree with the Court of Appeals and now reverse.

II

The starting point of our analysis is *Doyle* v. *Ohio*, 426 U. S. 610 (1976). The petitioners in *Doyle* were arrested for selling marijuana. They were given *Miranda* warnings and made no postarrest statements about their involvement in the crime. They contended at trial that they had been framed by the government informant. As part of his cross-examination, the prosecutor repeatedly asked petitioners why, if they were innocent, they did not give the explanation that they proffered at their separate trials to the police at the time of their arrest.[4] Defense counsel's timely objections to this line of questioning were overruled. Also over timely objections, the trial court allowed the prosecutor to argue petitioners' postarrest silence to the jury. 426 U. S., at 613–615, and n. 5. On review, this Court found that the *Miranda* decision "compel[led] rejection" of the contention that such questioning and argument are proper means of impeachment. 426 U. S., at 617. The Court noted that post-arrest silence may not be particularly probative of guilt. We also found that because *Miranda* warnings contain an implicit assurance "that silence will carry no penalty," 426 U. S., at 618, "'it does not comport with due process to permit the prosecution during the trial to call attention to [the defendant's] silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony,'" *id.*, at 619 (quoting *United States* v. *Hale*, 422 U. S. 171, 182–183 (1975) (WHITE, J., concurring in judgment)). Accordingly, the Court in *Doyle* held that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U. S., at 619.

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[3] The question presented for review in the petition for certiorari was: "Whether, when considering violations of *Doyle* v. *Ohio* in federal habeas corpus proceedings, the standard of review should be whether the error substantially affected the course of the trial rather than whether the error was harmless beyond a reasonable doubt." Pet. for Cert. i. Throughout their briefs and argument, the parties rather loosely refer to "*Doyle* violations." But the State presents extensive argument as to the proper standard for assessing a *Doyle* violation, Brief for Petitioner 24–29, stating at the beginning of its brief that the "effort to impeach respondent with his prior silence constituted an *attempted* violation of *[Doyle]*." *Id.*, at 16 (emphasis added). Miller responds to this argument. Brief for Respondent 24–37. Before reaching the question whether the harmless-error standard applies, we must be satisfied that an error of constitutional dimension occurred. This fundamental question is fairly included in the question presented for review. See this Court's Rule 21.1(a).

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[4] The questions by the prosecutor and the defendants' answers in these trials included:

"'Q. [I]f that is all you had to do with this and you are innocent, when [the agent] arrived on the scene why didn't you tell him?'" *Doyle* v. *Ohio*, 426 U. S., at 614.

"'Q. . . . You are innocent?

"'A. I am innocent. Yes Sir.

"'Q. That's why you told the police department and [the agent] when they arrived— . . . about your innocence?

"'A. . . . I didn't tell them about my innocence. No.'" *Id.*, at 614–615, n. 5.

"'Q. [Y]ou said instead of protesting your innocence, as you do today, you said in response to a question of [the agent],—"I don't know what you are talking about."

"'A. I believe what I said,—"What's this all about?" . . .

"'Q. All right,—But you didn't protest your innocence at that time?

"'A. Not until I knew what was going on.'" *Id.*, at 615, n. 5.

This Court has applied the holding of *Doyle* in a number of subsequent cases. These later holdings confirm that "*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *Wainwright* v. *Greenfield*, 474 U. S. 284, 291 (1986) (quoting *South Dakota* v. *Neville*, 459 U. S. 553, 565 (1983)). Thus, "absen[t] the sort of affirmative assurances embodied in the *Miranda* warnings," the Constitution does not prohibit the use of a defendant's postarrest silence to impeach him at trial. *Fletcher* v. *Weir*, 455 U. S. 603, 607 (1982). See *Jenkins* v. *Anderson*, 447 U. S. 231, 240 (1980) ("[N]o governmental action induced [the defendant] to remain silent *before* arrest") (emphasis added); *Anderson* v. *Charles*, 447 U. S. 404, 408 (1980) (cross-examination respecting inconsistent postarrest statements "makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent").

There is no question that Miller received the "implicit assurance" of *Miranda* warnings in this case. Thus, this prerequisite of a *Doyle* violation was met. But the holding of *Doyle* is that the Due Process Clause bars "*the use* for impeachment purposes" of a defendant's postarrest silence. 426 U. S., at 619 (emphasis added). The Court noted that "'it does not comport with due process *to permit* the prosecution during trial to call attention to [the defendant's] silence.'" *Ibid.* (quoting *United States* v. *Hale, supra,* at 182-183 (WHITE, J., concurring in judgment)) (emphasis added). It is significant that in each of the cases in which this Court has applied *Doyle,* the trial court has permitted specific inquiry or argument respecting the defendant's post-*Miranda* silence. See *Jenkins* v. *Anderson, supra,* at 233-234 (extended questioning and closing argument reference); *Anderson* v. *Charles, supra,* at 405-406 (questioning); *Fletcher* v. *Weir, supra,* at 603-604 (questioning); *South Dakota* v. *Neville, supra,* at 564 (admission of refusal to take blood-alcohol test); *Wainwright* v. *Greenfield, supra,* at 285, 287 (closing argument).

In contrast to these cases, the trial court in this case did not permit the inquiry that *Doyle* forbids. Instead, the court explicitly sustained an objection to the only question that touched upon Miller's postarrest silence. No further questioning or argument with respect to Miller's silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained.[5] Unlike the prosecutor in *Doyle,* the prosecutor in this case was not "allowed to undertake impeachment on," or "permit[ted] . . . to call attention to," Miller's silence. 426 U. S., at 619, and n. 10. The fact of Miller's postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no *Doyle* violation occurred in this case.[6]

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[5] According to the dissent, we "argu[e] in effect that a single comment cannot be sufficient to constitute a *Doyle* violation." *Post,* at 770. On the contrary, we hold that the sequence of events at the trial, beginning with the single comment—but including particularly the proper and immediate action by the trial court, and the failure by defense counsel to request more specific instructions—indicates that Miller's postarrest silence was not used against him within the meaning of *Doyle.*

The dissent also finds that "the prosecutor clearly got full mileage out of his *Doyle* violation during closing argument . . . by stressing that the accomplice's testimony was credible precisely because he had *not* remained silent after arrest." *Post,* at 773, n. 3. First, whether this argument constitutes "full mileage" is certainly debatable. Second, the dissent fails to note that defense counsel did not object to that portion of the prosecutor's argument on this ground.

III

Although the prosecutor's question did not constitute a *Doyle* violation, the fact remains that the prosecutor attempted to violate the rule of *Doyle* by asking an improper question in the presence of the jury. This Court has recognized that prosecutorial misconduct may "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974). To constitute a due process violation, the prosecutorial misconduct must be "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *United States* v. *Bagley*, 473 U. S. 667, 676 (1985) (quoting *United States* v. *Agurs*, 427 U. S. 97, 108 (1976)).

The Illinois Supreme Court, applying the analysis of *Chapman* v. *California*, 386 U. S. 18 (1967), found that the prosecutor's question was harmless beyond a reasonable doubt. 96 Ill. 2d, at 396, 450 N. E. 2d, at 327. We thus are convinced that it would find no due process violation under the facts of this case.[7] When a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important "as an initial matter to place th[e] remar[k] in context." *Darden* v. *Wainwright*, 477 U. S. 168, 179 (1986). See *Donnelly* v. *DeChristoforo*, *supra*, at 639 (determining whether "remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's due process rights"). The sequence of events in this case—a single question, an immediate objection, and two curative instructions[8]—clearly indicates that the prosecutor's improper question did not violate Miller's due process rights. The Illinois Supreme Court's determination that the properly admit-

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[6] JUSTICE STEVENS believes that there was a violation of *Doyle* in this case. He nevertheless joins the judgment on the ground that "*Doyle* errors are not so fundamentally unfair that convictions must be reversed whenever the State cannot bear the heavy burden of proving that the error was harmless beyond a reasonable doubt." *Post*, at 768–769. As we conclude that "no *Doyle* violation occurred in this case," we have no occasion to consider whether *Doyle* errors may be viewed differently on collateral attack from on direct review.

[7] The Federal District Court agreed with the State Supreme Court. App. to Pet. for Cert. C–1—C–4. Because the *Chapman* harmless-error standard is more demanding than the "fundamental fairness" inquiry of the Due Process Clause, it is clear that the District Court also would have found no due process violation. Although the Court of Appeals did not specifically address the due process question, it analyzed the facts of this case fully and in detail. See *United States ex rel. Miller* v. *Greer*, 789

F. 2d 438, 445–447 (CA7 1986). We conclude that the facts, as fully developed and reviewed in the five decisions below, are sufficient for us to determine whether the prosecutor's question in this case rises to the level of a due process violation.

[8] The first curative instruction occurred immediately after the trial court sustained defense counsel's objection to the prosecutor's question. Although the trial judge indicated that his ruling on the admissibility of this type of evidence was "for the time being," App. 32, he later told counsel at a bench conference that he had determined that this type of questioning was improper. *Id.*, at 43. Defense counsel did not request that any additional instructions be given to the jury. Before the jury began to deliberate, the trial judge nevertheless gave a second instruction to the jury that it should "disregard questions . . . to which objections were sustained." *Id.*, at 47.

We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, *Richardson* v. *Marsh*, 481 U. S. 200, 208 (1987), and a strong likelihood that the effect of the evidence would be "devastating" to the defendant, *Bruton* v. *United States*, 391 U. S. 123, 136 (1968). We have no reason to believe that the jury in this case was incapable of obeying the curative instructions. And far from being "devastating," the fact of Miller's postarrest silence was at most "insolubly ambiguous." *Doyle* v. *Ohio*, 426 U. S. 610, 617 (1976). Miller argues that the curative instructions should have been more specific. But Miller's trial counsel bore primary responsibility for ensuring that the error was cured in the manner most advantageous to his client. Once it became apparent that the judge was not going to grant a mistrial, it was the duty of counsel to determine what strategy was in his client's best interest.

ted evidence at trial "was sufficient to prove defendant's guilt beyond a reasonable doubt," 96 Ill. 2d, at 396, 450 N. E. 2d, at 327, further supports this result.[9]

IV

We reverse the judgment of the Court of Appeals for the Seventh Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

Having dissented in *Doyle* v. *Ohio*, 426 U. S. 610, 620–635 (1976), I can readily understand why the Court might want to overrule that case. But if there is to be a rule that prohibits a prosecutor's use of a defendant's post-*Miranda* silence, it should be a clearly defined rule. Whether the trial court sustains an objection to an impermissible question, or whether the prosecutor is allowed to refer to the defendant's silence in his or her closing arguments, are questions that are relevant to the harmless-error inquiry, or to deciding whether the error made the trial fundamentally unfair. But they play no role in deciding whether a prosecutor violated the implicit promise of *Miranda*—as understood in *Doyle*—that the defendant's silence will not be used against him.

I, therefore, agree with the 10 Illinois judges and 12 federal judges who have concluded that the rule of the *Doyle* case was violated when the prosecutor called the jury's attention to respondent's silence. Moreover, for the reasons stated by the Court of Appeals, I think the violation was serious enough to support that court's conclusion that the error was not harmless beyond a reasonable doubt. *United States ex rel. Miller* v. *Greer*, 789 F. 2d 438, 445–447 (CA7 1986) (en banc). Were this case here on direct appeal, therefore, I would vote to reverse the conviction.

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[9] This evidence primarily consisted of the detailed testimony of Williams that was corroborated by physical and other testimonial evidence. See 96 Ill. 2d, at 387–392, 450 N. E. 2d, at 323–325.

Nonetheless, I concur in the Court's judgment because I believe the question presented in the certiorari petition—whether a federal court should apply a different standard in reviewing *Doyle* errors *in a habeas corpus action*—should be answered in the affirmative. In *Rose* v. *Lundy*, 455 U. S. 509 (1982), I argued that there are at least four types of alleged constitutional errors.

> "The one most frequently encountered is a claim that attaches a constitutional label to a set of facts that does not disclose a violation of any constitutional right. . . . The second class includes constitutional violations that are not of sufficient import in a particular case to justify reversal even on direct appeal, when the evidence is still fresh and a fair retrial could be promptly conducted. *Chapman* v. *California*, 386 U. S. 18, 22; *Harrington* v. *California*, 395 U. S. 250, 254. A third category includes errors that are important enough to require reversal on direct appeal but do not reveal the kind of fundamental unfairness to the accused that will support a collateral attack on a final judgment. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465. The fourth category includes those errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained." *Id.*, at 543–544 (dissenting opinion) (footnote omitted).

In my view, *Doyle* violations which cannot be deemed harmless beyond a reasonable doubt typically fall within the third of these categories. On *direct review*, a conviction should be reversed if a defendant can demonstrate that a *Doyle* error occurred at trial, and the State cannot demonstrate that it is harmless beyond a reasonable doubt. But, in typical *collateral attacks*, such as today's, *Doyle* errors are not so fundamentally unfair that convictions must be reversed whenever the State cannot bear the heavy burden of proving that the error was harmless beyond a reasonable doubt. On the other hand, there may be extraordinary cases in which the *Doyle* error is so egregious, or is combined with other errors or incidents of prosecutorial misconduct, that the integrity of the process is called into question. In such an event, habeas corpus relief should be afforded.*

In sum, although I agree with the Court's judgment, and the standard that it applies here, I would apply this standard only to *Doyle* violations being considered on collateral review. On direct appeal, a *Doyle* error should give rise to reversal of the conviction unless the State can prove that the error was harmless beyond a reasonable doubt.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Today the Court holds that a prosecutor may comment on a defendant's postarrest silence in an attempt to impeach his credibility without thereby violating the rule of *Doyle* v. *Ohio*, 426 U. S. 610 (1976). The Court arrives at this surprising conclusion only by confusing the question whether a *Doyle* violation occurred with the question whether that violation was harmless beyond a reasonable doubt. The holding is remarkable not only because it radically departs from the settled practice of the lower courts, but also because it is founded on a point conceded below and not raised here.

Until today, the common understanding of "our opinion in *Doyle* v. *Ohio* . . . [was that it] shields from *comment* by a prosecutor a defendant's silence after receiving *Miranda* warnings." *Wainwright* v. *Greenfield*, 474 U. S. 284, 296 (1986) (REHNQUIST, J., concurring in result) (emphasis

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*In *Rose* v. *Lundy*, I noted that the distinction between direct and habeas review is supported by the Court's decisions concerning retroactive application of newly recognized constitutional rights. 455 U. S., at 509, 543, n. 8 (dissenting opinion). Our recent decision in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), endorsed Justice Harlan's view on this issue to a great extent, and thus supports this proposition. Compare *Griffith*, *supra*, with *Allen* v. *Hardy*, 478 U. S. 255 (1986).

added). Accordingly, a defendant has been able to establish a *Doyle* violation simply by showing that the prosecutor "'call[ed] attention to'" the defendant's postarrest silence. *Doyle*, *supra*, at 619 (citation omitted). "The standard is strict; virtually any description of a defendant's silence following arrest and a *Miranda* warning will constitute a *Doyle* violation." *United States* v. *Shaw*, 701 F. 2d 367, 382 (CA5 1983); see, *e. g.*, *Passman* v. *Blackburn*, 797 F. 2d 1335, 1346 (CA5 1986) (citing *Shaw*); *United States* v. *Rosenthal*, 793 F. 2d 1214, 1243 (CA11 1986) (same); *United States* v. *Elkins*, 774 F. 2d 530, 537 (CA1 1985) (*Doyle* is "strictly applied so that any description of defendant's silence following arrest and *Miranda* warning . . . constitutes a violation of the Due Process Clause"); *Webb* v. *Blackburn*, 773 F. 2d 646, 648 (CA5 1985) ("*Doyle* . . . proclaimed a general rule that the prosecution cannot comment on an accused's post-arrest silence"); *United States* v. *Remigio*, 767 F. 2d 730, 734 (CA10 1985) ("[T]his Circuit has consistently held that comments by prosecutors on an accused's silence were plain, fundamental error") (citations omitted). In light of this authority and the prosecutor's "clear-cut" attempt to use the defendant's postarrest silence to impeach his credibility, *United States ex rel. Miller* v. *Greer*, 789 F. 2d 438, 447 (CA7 1986), it is not surprising that the five other courts that examined this case found a *Doyle* violation.

To support its decision that no *Doyle* violation occurred in this case, the Court argues in effect that a single comment cannot be sufficient to constitute a *Doyle* violation. A single comment, the Court suggests, does not amount to the "use" of a defendant's silence for impeachment purposes, and is not equivalent to an "inquiry or argument respecting the defendant's post-*Miranda* silence." *Ante*, at 764. What the Court overlooks, however, is the fact that a single comment is all the prosecutor needs to notify the jury that the defendant did not "tell his story" promptly after his arrest. Although silence at the time of arrest is "insolubly ambiguous" and may be "consistent with . . . an exculpatory explanation," *Doyle*, *supra,* at 617, 618, and n. 8, nevertheless "the jury is likely to draw" a "strong negative inference" from the fact of a defendant's postarrest silence. *United States* v. *Hale,* 422 U. S. 171, 180 (1975). Thus, as the lower courts have consistently found, a prosecutor may in a single comment effectively use a defendant's postarrest silence to impeach his or her credibility. See, *e. g., United States* v. *Remigio, supra,* at 734–735.

The Court also notes that the trial court sustained defendant's objection to the prosecutor's improper question, and that the court later instructed the jury to disregard all questions to which an objection had been sustained. These actions minimized the harm this particular comment might have caused, the Court implies, and also distinguish this case from previous cases in which this Court has applied *Doyle. Ante,* at 764. In the case on which *Doyle* was squarely based, however, the Court reversed a conviction because of improper questioning regarding post-*Miranda* silence even though the jury was immediately instructed to disregard that questioning. See *United States* v. *Hale, supra,* at 175, n. 3. Moreover, the lower courts have routinely addressed similar situations, and in no case in which the prosecutor has commented on the defendant's silence have these courts found contemporaneous objections or curative instructions sufficient *automatically* to preclude finding a *Doyle* violation. Instead, the Courts of Appeals have examined the comment in context, and considered it along with the weight of the evidence against the defendant and the importance of the defendant's credibility to the defense, in determining whether a *Doyle* violation was harmless beyond a reasonable doubt.[1] "In no case has a prompt and forceful instruction *alone* been held sufficient to vitiate the use of post-arrest silence." *Morgan* v. *Hall,* 569 F. 2d 1161, 1167–1168 (CA1 1978) (emphasis added) (citing cases); see also *United States* v. *Elkins*, *supra*, at 534 (instruction that defendant's silence is not evidence of guilt is not enough to cure *Doyle* violations); *United States* v. *Remigio*, *supra*, at 735 (finding "no merit" in Government's argument that timely objection and cautionary instruction were enough to cure single comment by prosecutor in violation of *Doyle*); *United States* v. *Johnson*, 558 F. 2d 1225, 1230 (CA5 1977) ("Though the trial court instructed the jury not to consider that remark, the testimony was so prejudicial that a simple instruction cannot cure it").

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[1] See, *e. g., Matire* v. *Wainwright,* 811 F. 2d 1430, 1436–1437 (CA11 1987); *United States* v. *Harrold,* 796 F. 2d 1275, 1280 (CA10 1986); *United States* v. *Elkins,* 774 F. 2d 530, 535–540 (CA1 1985); *United States* v. *Shaw,* 701 F. 2d 367, 382–384 (CA5 1983) (discussing cases).

The approach taken by the lower courts reflects both the serious impact of *Doyle* violations on the fairness of a trial, and the inherent difficulty in undoing the harm that they cause. With respect to their impact, more than one Circuit has recognized that "*Doyle* violations are rarely harmless." *Williams* v. *Zahradnick*, 632 F. 2d 353, 364 (CA4 1980) (citing practice in the Fifth Circuit with approval). This is because "questions of guilt and credibility [are often] inextricably bound together," *Morgan* v. *Hall*, *supra*, at 1168, and because comments upon a defendant's failure to tell his or her story promptly after arrest may significantly undermine the defendant's credibility in the jury's eyes. This case illustrates the potential for harm. The only testimony the State offered that linked the defendant to the crime was that of an alleged accomplice. Jurors often give accomplice testimony reduced weight, particularly when the accomplice has received in return a promise of significant leniency.[2] Here the State's case depended entirely on whether the jury believed the defendant or the alleged accomplice. The prosecutor's second question on cross-examination—"Why didn't you tell this story to anybody when you got arrested?"— thus struck directly at the heart of Miller's defense: his credibility. If the rationale of *Doyle* is to have any force, defendants must be protected from such tactics.

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[2] Although the accomplice, Randy Williams, admitted shooting the victim, the State dropped charges of murder, aggravated kidnaping, and robbery, and agreed to a sentence of two years' probation, in return for his testimony. *United States ex rel. Miller* v. *Greer*, 789 F. 2d 438, 440, 446, n. 7 (CA7 1986). Respondent Miller was sentenced to 80 years for murder, 30 years for aggravated kidnaping, and 7 years for robbery. *Id.*, at 441. The jury was aware that a "deal" between the State and Williams had been struck. App. 45–46.

Lower courts have also recognized that once the prosecutor calls attention to the defendant's silence, the resultant harm is not easily cured. First, the jury is made aware of the fact of postarrest silence, and a foundation is laid for subsequent, more subtle attacks.[3] Second, "curative" instructions themselves call attention to defendant's silence, and may in some cases serve to exacerbate the harm. In a related context, involving a prosecutor's statement calling attention to the defendant's decision not to testify at trial, JUSTICE STEVENS has argued that "[i]t is unrealistic to assume that instructions on the right to silence always have a benign effect." *Lakeside* v. *Oregon*, 435 U. S. 333, 347 (1978) (dissenting opinion).

> "For the judge or prosecutor to call [the defendant's failure to testify] to the jury's attention has an undeniably adverse effect on the defendant. Even if jurors try

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[3] For example, the prosecutor clearly got full mileage out of his *Doyle* violation during closing argument. He was able to exploit the jury's awareness of defendant's postarrest silence by stressing that the accomplice's testimony was credible precisely because he had *not* remained silent after arrest:

"We made a deal, if you want to call it that, with a guy [the accomplice] who's willing to tell the truth, a man who told the truth of his involvement on February 10, 1980 [the day after the crime]. Sure, he was wrong in details; sure, he left some things out; sure, his statement is confusing; sure, he lied at that time about not being with his brother as they left the Regulator Tavern at first, but he was in custody only a few hours. He was charged with murder. He knew they had him, cold turkey, but he told them a story, as they call it, an account, as I call it, shortly after his arrest, factually corroborated by an independent investigator. So if you call that a deal, put that aside. The question is, deal or no deal, did Randy tell you the truth. It really boils down to, who told you the story here and who told you the truth? You either believe Randy Williams or you believe 'Chuck' Miller. That is your choice. It's as simple as that." *Ibid.*

> faithfully to obey their instructions, the connection between silence and guilt is often too direct and too natural to be resisted. When the jurors have in fact overlooked it, telling them to ignore the defendant's silence is like telling them not to think of a white bear." *Id.*, at 345.

Justice Simon of the Illinois Supreme Court has elaborated on this point:

> "An improper inquiry by the prosecutor concerning the defendant's post-arrest silence is not automatically remedied by a cautionary instruction. . . . If [it were], the prosecutor would have little incentive to avoid such inquiries on cross-examination of the defendant; he could safely inform the jury of the defendant's post-arrest silence, risking only an objection by the defendant's counsel and a cautionary instruction by the trial court. A cautionary instruction is at best only a partial remedy. . . . The instruction may confuse the jury; or the jury may disregard it and use the defendant's silence against him anyway. In a close case like this one, based wholly upon accomplice testimony and circumstantial evidence, the reference to post-arrest silence can work extreme prejudice against the defendant, notwithstanding a cautionary instruction." *People* v. *Miller*, 96 Ill. 2d 385, 398, 450 N. E. 2d 322, 328 (1983) (dissenting opinion).

Courts below have therefore considered prompt objections and curative instructions relevant to the question whether a comment on a defendant's silence is harmless error, but irrelevant to the question whether the comment violates *Doyle*. The Court today confuses the two inquiries, and thereby eliminates much of the protection afforded by *Doyle*.

Today's radical departure from established practice is particularly inappropriate because this ground for decision was not presented either to the courts below or to this Court. The State "concede[d]" in the Court of Appeals that "any comment referring to [defendant's] silence after that arrest [for murder] would be improper." 789 F. 2d, at 442.[4] It sought review in this Court not of the question whether a *Doyle* violation occurred, but whether, assuming the existence of a *Doyle* violation, the standard for appellate review should be more lenient than harmless error.[5] The question decided today was therefore *not* "fairly included in the question presented for review." *Ante*, at 761, n. 3. Moreover, the Court's contention, *ibid.*, that this question was argued in the briefs appears to me simply mistaken.[6] The Court has overturned the judgment below, and upset the settled practice of the lower courts, on a point which the State conceded below and did not raise here, and on which respondent has had no opportunity to be heard.

Today's decision saps *Doyle* of much of its vitality. I would adhere to *Doyle*'s principles, and to the established practice of the lower courts. I dissent.

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[4] In the Court of Appeals, the State argued against a finding of a *Doyle* violation solely on the ground that "the prosecutor's reference to Miller's postarrest silence could be construed as referring to the period between Miller's arrest on the weapons charge, when no *Miranda* warnings were given, and his arrest on the murder charge and receipt of *Miranda* warnings later that afternoon." 789 F. 2d, at 442.

[5] The sole question presented is explicitly premised on a finding of a *Doyle* violation: "Whether, *when considering violations* of *Doyle* v. *Ohio* in federal habeas corpus proceedings, the standard of review should be whether the error substantially affected the course of the trial rather than whether the error was harmless beyond a reasonable doubt." Pet. for Cert. i (emphasis added).

[6] Although one sentence in petitioner's brief refers to "an attempted violation of the rule of *Doyle*," Brief for Petitioner 16, the brief contains no other reference, direct or indirect, to the argument the Court develops today. One "casual reference . . . in the midst of an unrelated argument, is insufficient to inform a . . . court that it has been presented with a claim." *Board of Directors of Rotary International* v. *Rotary Club*, 481 U. S. 537, 550, n. 9 (1987). Apart from making what is at best a casual reference to the Court's argument, petitioner's brief is devoted to discussion of the question it presented—whether the standard of harmless error is appropriate for *Doyle* violations. Not surprisingly, there is no discussion of the Court's argument in respondent's brief.

BURGER *v.* KEMP, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86–5375. Argued March 30, 1987—Decided June 26, 1987

A Georgia trial court jury found petitioner guilty of murder and sentenced him to death. Both petitioner and a coindictee (Thomas Stevens) gave full confessions to the crime, and Stevens was tried later in a separate trial. The Georgia Supreme Court, after ordering a second sentencing hearing for petitioner which resulted in reimposition of the death sentence, affirmed the sentence. Throughout the state-court proceedings, petitioner was represented by appointed counsel, Alvin Leaphart, who was an experienced and well-respected local attorney. After exhausting state collateral remedies, petitioner (represented by a different attorney) sought habeas corpus relief in Federal District Court on the ground that Leaphart's representation was constitutionally inadequate, particularly because of a conflict of interest since Leaphart's law partner was appointed to represent Stevens at his trial, and Leaphart had assisted in that representation. At each trial, the defendant's strategy was to emphasize the coindictee's culpability in order to avoid the death penalty. Petitioner also based his Sixth Amendment claim of ineffective representation on Leaphart's failure to present any mitigating circumstances at the state-court sentencing hearings and on his allegedly inadequate investigation of the possibility of doing so. After an evidentiary hearing, the District Court rejected the Sixth Amendment claim, and the Court of Appeals ultimately affirmed.

Held:

1. There is no merit to petitioner's ineffective-assistance claim based on Leaphart's alleged conflict of interest. Even assuming that law partners are to be considered as one attorney in determining such a claim, requiring or permitting a single attorney to represent codefendants is not *per se* violative of constitutional guarantees of effective assistance of counsel. Any overlap of counsel did not so infect Leaphart's representation as to constitute an active representation of competing interests. Nor was an actual conflict established by the fact that Leaphart, who prepared the appellate briefs for both petitioner and Stevens, did not make a "lesser culpability" argument in petitioner's brief on his second appeal to the Georgia Supreme Court. That decision had a sound strategic basis and, as found by both the federal courts below, was not attributable to the fact that his partner was Stevens' lawyer, or to

the further fact that he assisted his partner in Stevens' representation. Moreover, the record did not support petitioner's contention that, because of the asserted actual conflict of interest, Leaphart did not negotiate a plea bargain for a life sentence (the prosecutor, in fact, having refused to bargain) or take advantage of petitioner's lesser culpability when compared to Stevens'. Pp. 783–788.

2. Nor did petitioner receive ineffective assistance because of Leaphart's failure to develop and present any mitigating evidence at either of the two state-court sentencing hearings. The evidence that might have been presented would have disclosed that petitioner had an exceptionally unhappy and unstable childhood. Based on interviews with petitioner, his mother, and others, Leaphart decided that petitioner's interest would not be served by presenting such evidence. His decision was supported by reasonable professional judgment, and thus met the standard set forth in *Strickland* v. *Washington*, 466 U. S. 668. Pp. 788–795.

785 F. 2d 890, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, and in Part II of which POWELL, J., joined, *post*, p. 796. POWELL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 817.

Joseph M. Nursey argued the cause for petitioner. With him on the briefs was *Millard C. Farmer*.

William B. Hill, Jr., Senior Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Michael J. Bowers*, Attorney General, *Marion O. Gordon*, First Assistant Attorney General, and *Susan V. Boleyn*, Senior Assistant Attorney General.

JUSTICE STEVENS delivered the opinion of the Court.

A jury in the Superior Court of Wayne County, Georgia, found petitioner Christopher Burger guilty of murder and sentenced him to death on January 25, 1978. In this habeas corpus proceeding, he contends that he was denied his constitutional right to the effective assistance of counsel because his lawyer labored under a conflict of interest and failed to make an adequate investigation of the possibly mitigating circumstances of his offense. After a full evidentiary hearing, the District Court rejected the claim. We are persuaded, as was the Court of Appeals, that the judgment of the District Court must be affirmed.

I

The sordid story of the crime involves four soldiers in the United States Army who were stationed at Fort Stewart, Georgia, on September 4, 1977. On that evening, petitioner and his coindictee, Thomas Stevens, both privates, were drinking at a club on the post. They talked on the telephone with Private James Botsford, who had just arrived at the Savannah Airport, and agreed to pick him up and bring him back to the base. They stole a butcher knife and a sharpening tool from the mess hall and called a cab that was being driven by Roger Honeycutt, a soldier who worked part-time for a taxi company. On the way to the airport, petitioner held the knife and Stevens held the sharpening tool against Honeycutt. They forced him to stop the automobile, robbed him of $16, and placed him in the backseat. Petitioner took over the driving. Stevens then ordered Honeycutt to undress, threw each article of his clothing out of the car window after searching it, blindfolded him, and tied his hands behind his back. As petitioner drove, Stevens climbed into the backseat with Honeycutt, where he compelled Honeycutt to commit oral sodomy on him and anally sodomized him. After stopping the car a second time, petitioner and Stevens placed their victim, nude, blindfolded, and hands tied behind his back, in the trunk of the cab. They then proceeded to pick up Botsford at the airport. During the ride back to Fort Stewart, they told Botsford that they had stolen the cab and confirmed their story by conversing with Honeycutt in the trunk. In exchange for Botsford's promise not to notify the authorities, they promised that they would not harm Honeycutt after leaving Botsford at the base.

Ultimately, however, petitioner and Stevens drove to a pond in Wayne County where they had gone swimming in the past. They removed the cab's citizen-band radio and, while

Stevens was hiding the radio in the bushes, petitioner opened the trunk and asked Honeycutt if he was all right. He answered affirmatively. Petitioner then closed the trunk, started the automobile, and put it in gear, getting out before it entered the water. Honeycutt drowned.

A week later Botsford contacted the authorities, and the military police arrested petitioner and Stevens. The two men made complete confessions. Petitioner also took the military police to the pond and identified the point where Honeycutt's body could be found. Petitioner's confession and Private Botsford's testimony were the primary evidence used at Burger's trial. That evidence was consistent with the defense thesis that Stevens, rather than petitioner, was primarily responsible for the plan to kidnap the cabdriver, the physical abuse of the victim, and the decision to kill him. Stevens was 20 years old at the time of the killing. Petitioner was 17;[1] a psychologist testified that he had an IQ of 82 and functioned at the level of a 12-year-old child.

II

Alvin Leaphart was appointed to represent petitioner about a week after his arrest. Leaphart had been practicing law in Wayne County for about 14 years, had served as the county's attorney for most of that time, and had served on the Board of Governors of the State Bar Association. About 15 percent of his practice was in criminal law, and he had tried about a dozen capital cases. It is apparent that he was a well-respected lawyer, thoroughly familiar with practice and sentencing juries in the local community. He represented petitioner during the proceedings that resulted in his conviction and sentence, during an appeal to the Georgia Supreme Court which resulted in a vacation of the death penalty, during a second sentencing hearing, and also during a second appeal which resulted in affirmance of petitioner's capital sentence in 1980. *Burger* v. *State*, 242 Ga. 28, 247 S. E. 2d 834 (1978); *Burger* v. *State*, 245 Ga. 458, 265 S. E. 2d 796, cert. denied, 446 U. S. 988 (1980). Leaphart was paid approximately $9,000 for his services.

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[1] In his direct review and collateral proceedings to date, petitioner has not advanced the claim that execution by a State of a person for a murder committed while a minor violates the Eighth and Fourteenth Amendments to the Constitution. Cf. *Thompson* v. *State*, 724 P. 2d 780 (Okla. Crim. App. 1986) (defendant was 15 years old at time of crime), cert. granted, 479 U. S. 1084 (1987). We have held that a habeas petitioner may "establish cause for a procedural default if his claim is 'so novel that its legal basis is not reasonably available to counsel.'" *Murray* v. *Carrier*, 477 U. S. 478, 489–490 (1986) (quoting *Reed* v. *Ross*, 468 U. S. 1, 16 (1984)). Of course, we do not now determine whether the legal basis for a constitutional claim based on the youth of the defendant was reasonably available to petitioner in 1978. Nor do we rule upon whether refusal to consider such a claim would carry with it "the risk of a manifest miscarriage of justice" and would thus permit a habeas corpus court to address the merits of the claim in a subsequent proceeding. *Smith* v. *Murray*, 477 U. S. 527, 537–538 (1986).

After exhausting his state collateral remedies, petitioner (then represented by a different attorney) filed a habeas corpus proceeding in the United States District Court for the Southern District of Georgia. He advanced several claims, including a charge that Leaphart's representation had been constitutionally inadequate. The District Court conducted an evidentiary hearing and emphatically rejected that claim,[2] but concluded that the trial court's instructions to the jury permitted it to base its sentencing decision on an invalid aggravating circumstance. Accordingly, the District Court vacated petitioner's death sentence. *Blake* v. *Zant*, 513 F. Supp. 772 (1981).

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[2] "The Court most definitely finds no basis for concluding that Mr. Leaphart's representation was constitutionally inadequate." *Blake* v. *Zant*, 513 F. Supp. 772, 802 (1981). In a footnote, the court added:

"This Court is particularly concerned by arguments raised with respect to ineffective assistance of counsel. I certainly do not question the wisdom or the propriety of advancing every legitimate argument on petitioner's behalf. However, many, if not all, the allegations made against Mr. Leaphart are directly contradicted by the record. Thus, they could not possibly be of any benefit to Mr. Burger. On the other hand, the raising of such unfounded charges must have a significant 'chilling effect' on the willingness of experienced attorneys, like Mr. Leaphart, to undertake the defense of capital cases. Petitioner's attorneys here might do well to reconsider their apparent policy of routinely attacking the performance of trial counsel in light of this fact." *Id.*, at 802, n. 13.

The Court of Appeals affirmed in part, reversed in part, and reinstated the death penalty. *Burger* v. *Zant*, 718 F. 2d 979 (CA11 1983). On the issue of Leaphart's competence, it adopted the District Court's opinion as its own over the dissent of Judge Johnson. The dissent found that Leaphart had a conflict of interest because his partner Robert Smith[3] had been appointed to represent Stevens in his later, separate trial for the murder of Honeycutt, and Leaphart had assisted in that representation. He had interviewed Stevens and assisted his partner during Stevens' trial. Moreover, the two partners shared their legal research and discussed the cases with one another. Judge Johnson was persuaded that the conflict created actual prejudice to petitioner's interest for two reasons. First, each of the two defendants sought to emphasize the culpability of the other in order to avoid the death penalty. Second, Leaphart failed to negotiate a plea bargain in which petitioner's testimony against Stevens might be traded for a life sentence. Judge Johnson was also persuaded that Leaphart's performance was defective because he did not conduct an adequate investigation of possible mitigating circumstances and did not have a valid strategic explanation for his failure to offer any mitigating evidence at either the first or the second sentencing hearing.

After the Court of Appeals rendered its decision, we decided *Strickland* v. *Washington*, 466 U. S. 668 (1984). We granted Burger's petition for certiorari and remanded the case to the Court of Appeals for consideration of "the effectiveness of counsel's assistance at petitioner's second sentencing hearing" in light of that decision. *Burger* v. *Zant*,

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[3] Leaphart and Smith were both members of the same professional corporation. The form of their business organization is not relevant to this case and they will be described as partners for the sake of convenience.

467 U. S. 1212, 1213 (1984). The Court of Appeals in turn remanded the case to the District Court with instructions to extend or revise its findings, and if appropriate, its conclusions on the ineffective-assistance-of-counsel claim. *Burger* v. *Zant*, 741 F. 2d 1274 (CA11 1984). The District Court wrote a more extensive opinion on that issue and again concluded that there was no merit to petitioner's claim. Once again, the Court of Appeals affirmed on the basis of the District Court's opinion, over the dissent of Judge Johnson. *Burger* v. *Kemp*, 753 F. 2d 930 (CA11 1985) *(per curiam).*[4] We granted the petition for certiorari, vacated, and remanded for reconsideration in light of *Francis* v. *Franklin*, 471 U. S. 307 (1985), on the question whether the jury instruction impermissibly shifted the burden of proof on the issue of intent. *Burger* v. *Kemp*, 474 U. S. 806 (1985). The Court of Appeals assumed the trial court's charge on intent unconstitutionally shifted the burden of proof, but found the error harmless beyond a reasonable doubt. 785 F. 2d 890 (1986) *(per curiam).* We granted certiorari, 479 U. S. 929 (1986), and now affirm. We first consider counsel's alleged conflict of interest argument and then his failure to offer mitigating evidence.[5]

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[4] The opinion of the District Court is published as an Appendix to the Court of Appeals' opinion. 753 F. 2d, at 932–942.

[5] Petitioner also argues in this proceeding that the malice charge given to the jury at the guilt or innocence phase of his trial was unconstitutional under *Francis* v. *Franklin*, 471 U. S. 307 (1985). The trial court charged the jury that a "person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts." The Court of Appeals observed that the jury instruction was "virtually identical to the one held unconstitutional in *Franklin*," 785 F. 2d, at 891, even though the trial court also instructed the jury that a person will not be presumed to act with criminal intent and that a specific intent to commit the crime charged was an essential element of the crime that the State must prove beyond a reasonable doubt. The Court of Appeals found any error harmless beyond a reasonable doubt. We agree with the Court of Appeals that, pretermitting the inquiry whether the trial judge's charge to the jury impermissibly shifted the burden of proof on the question of petitioner's criminal intent

III

There is certainly much substance to petitioner's argument that the appointment of two partners to represent coindictees in their respective trials creates a possible conflict of interest that could prejudice either or both clients. Moreover, the risk of prejudice is increased when the two lawyers cooperate with one another in the planning and conduct of trial strategy, as Leaphart and his partner did. Assuming without deciding that two law partners are considered as one attorney, it is settled that "[r]equiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Holloway* v. *Arkansas*, 435 U. S. 475, 482 (1978). We have never held that the possibility of prejudice that "inheres in almost every instance of multiple representation" justifies the adoption of an inflexible rule that would presume prejudice in all such cases. See *Cuyler* v. *Sullivan*, 446 U. S. 335, 348 (1980). Instead, we presume prejudice "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U. S., at 692 (citation omitted). See also *Cuyler*, 446 U. S., at 348, 350.

As an initial matter, we agree with the District Court that the overlap of counsel, if any, did not so infect Leaphart's representation as to constitute an active representation of competing interests. Particularly in smaller communities where the supply of qualified lawyers willing to accept the demanding and unrewarding work of representing capital prisoners is extremely limited, the defendants may actually benefit from the joint efforts of two partners who supplement

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to commit murder, "'the evidence was so dispositive of intent'" that it can be said beyond a reasonable doubt that "'the jury would have found it unnecessary to rely on the presumption.'" See *Rose* v. *Clark*, 478 U. S. 570, 583 (1986) (quoting *Connecticut* v. *Johnson*, 460 U. S. 73, 97, n. 5 (1983) (POWELL, J., dissenting)).

one another in their preparation. In many cases a " 'common defense . . . gives strength against a common attack.' " *Holloway* v. *Arkansas*, 435 U. S., at 482–483 (quoting *Glasser* v. *United States*, 315 U. S. 60, 92 (1942) (dissenting opinion of Frankfurter, J.)). Moreover, we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client. Trial courts appropriately and "necessarily rely in large measure upon the good faith and good judgment of defense counsel." *Cuyler*, 446 U. S., at 347. In addition, petitioner and Stevens were tried in separate proceedings; as we noted in *Cuyler*, the provision of separate murder trials for the three coindictees "significantly reduced the potential for a divergence in their interests." *Ibid.*

In an effort to identify an actual conflict of interest, petitioner points out that Leaphart prepared the briefs for both him and Stevens on their second appeal to the Georgia Supreme Court, and that Leaphart did not make a "lesser culpability" argument in his appellate brief on behalf of petitioner even though he had relied on petitioner's lesser culpability as a trial defense. Given the fact that it was petitioner who actually killed Honeycutt immediately after opening the trunk to ask if he was all right, and the further fact that the Georgia Supreme Court expressed the opinion that petitioner's actions were "outrageously and wantonly vile and inhuman under any reasonable standard of human conduct," *Burger* v. *State*, 245 Ga., at 461–462, 265 S. E. 2d, at 800, the decision to forgo this issue had a sound strategic basis. As we reaffirmed in *Smith* v. *Murray*, 477 U. S. 527, 536 (1986), the "process of 'winnowing out weaker claims on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones* v. *Barnes*, 463 U. S. 745, 751–752 (1983)."

In addition, determining that there was an actual conflict of interest requires the attribution of Leaphart's motivation for not making the "lesser culpability" argument to the fact that his partner was Stevens' lawyer, or to the further fact that he assisted his partner in that representation. The District Court obviously credited his testimony to the contrary, see 513 F. Supp., at 795; 753 F. 2d, at 941, and its findings were twice sustained by the Court of Appeals. It would thus be most inappropriate, and factually unsupportable, for this Court to speculate that the drafting of a brief on appeal was tainted by a lawyer's improper motivation. Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case. Nevertheless, when the lower courts have found that a lawyer has performed his or her solemn duties in such a case at or above the lower boundary of professional competence, both respect for the bar and deference to the shared conclusion of two reviewing courts prevent us from substituting speculation for their considered opinions. The district judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar and who saw and heard the witness testify, is in a far better position than we are to evaluate a charge of this kind, and the regional courts of appeals are in a far better position than we are to conduct appellate review of these heavily fact-based rulings.

We also conclude that the asserted actual conflict of interest, even if it had been established, did not harm his lawyer's advocacy. Petitioner argues that the joint representation adversely affected the quality of the counsel he received in two ways: Leaphart did not negotiate a plea agreement resulting in a life sentence, and he failed to take advantage of petitioner's lesser culpability when compared with his co-indictee Stevens. We find that neither argument provides a basis for relief.

The notion that the prosecutor would have been receptive to a plea bargain is completely unsupported in the record. The evidence of both defendants' guilt, including their confessions, and eyewitness and tangible evidence, was overwhelming and uncontradicted; the prosecutor had no need for petitioner's eyewitness testimony to persuade the jury to convict Stevens and to sentence him to death. In these circumstances, there is not the slightest reason for appellate doubt of the veracity of Leaphart's testimony:

> "Q. Did you ever engage in any plea negotiations in this case?
>
> "A. Yes.
>
> "Q. Could you tell me the substance of it?
>
> "A. Well, we—I constantly all during the time I represented Mr. Burger tried to negotiate a plea with the district attorney for a life sentence. And, he—during the first trial he just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to—in that time to try to negotiate with the—with the district attorney about entering a plea, for Mr. Burger to serve a life sentence. And, he insisted on trying it and insisted on seeking the death penalty." App. 74–75.

As the District Court found, Leaphart "constantly attempted to plea bargain with the prosecutor," but was rebuffed. 753 F. 2d, at 940. "The prosecutor's flat refusal to engage in plea bargaining is not surprising when viewed in light of the strength of the case against Burger." *Ibid.*

The argument that his partner's representation of Stevens inhibited Leaphart from arguing petitioner's lesser culpability because such reliance would be prejudicial to Stevens is also unsupported by the record. Such an argument might have been more persuasive if the two defendants had been tried together. As the State conducted the prosecutions, however, each defendant's confession was used in his trial but neither was used against the coindictee. Because the trials were separate, Leaphart would have had no particular reason for concern about the possible impact of the tactics in petitioner's trial on the outcome of Stevens' trial. Moreover, in the initial habeas corpus proceeding, the District Court credited Leaphart's uncontradicted testimony that "he in no way tailored his strategy toward protecting Stevens." 513 F. Supp., at 795. The District Court concluded that his "testimony is strongly supported by examination of trial record, which shows considerable effort to gain mercy for petitioner by portraying Stevens as the chief architect of the crime." *Ibid.*[6]

In an effort to bolster his claim that an adverse effect resulted from Leaphart's actual conflict of interest, petitioner argues that because he was tried in a small community in which the facts of the crime were widely known, "it necessarily follows that the public, and very possibly members of the jury, knew that the cases were being tried on inherently inconsistent theories." Brief for Petitioner 14. But this observation does nothing to establish an actual, deleterious conflict of interest between Leaphart's work for his client and his partner's representation of Stevens. If two unaffiliated lawyers, complete strangers to one another, had represented Burger and Stevens respectively and had advanced the same defenses that were advanced, the community would have had the same awareness that the theories were inherently inconsistent. There was undoubtedly a conflict of interest between Burger and Stevens because of the nature of their defenses. But this inherent conflict between two participants in a single criminal undertaking cannot be transformed into a Sixth Amendment violation simply because the community might be aware that their respective attorneys were law partners.

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[6] We note that Leaphart persisted in this strategy in his closing argument to the jury at the second sentencing hearing. He argued, in part:

"Each and every one of these acts, according to this statement which they have introduced into evidence, the initiation of the crime, the act of robbery, the acts of sodomy, the acts of tying him up, the telling him to get in the trunk, the saying let's kill him, telling him where to drive, telling him we must get rid of the car, we must get rid of the fingerprints, who was that? That was all Stevens. Stevens is not on trial here today.

"Now, this boy here was seventeen years old at that time, and Stevens was twenty. Now, we all know that the influence that a twenty year old person has over a seventeen year old person who he looks on as his friend and companion. And, all of this bears out that Stevens was the one in control. . . .

". . . You may recommend life imprisonment even though you have found aggravating circumstances, or one or more of the aggravating circumstances given to you in this charge to have existed beyond a reasonable doubt.

"Well, why is that the law? That's the law because of the situations such as this where you have a moving force, and you have a person who follows along and does the beating [bidding] of an individual, who gets convicted of murder. And, the person who actually perpetrated the crime was, and actually was the catalyst, the moving force that carried it all about and did all these things even though this person was a part of it, that the punishment of one is different from the punishment of the other, or can be. That was in your discretion.

"And, in this particular situation, even though you say under these set of circumstances these things existed, Burger did none of that, except being involved there at that time and going along with Stevens who was the leader." 2 Tr. 252–254 (second sentencing hearing).

IV

The District Court expressed much more concern about petitioner's argument that Leaphart had failed to develop and present mitigating evidence at either of the two sentencing hearings. See 513 F. Supp., at 796. At both hearings Leaphart offered no mitigating evidence at all. A capital sentencing proceeding "is sufficiently like a trial in its adversarial format and in the existence of standards for decision" that counsel's role in the two proceedings is comparable—it is "to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Strickland*, 466 U. S., at 686, 687. We therefore must determine whether Leaphart's performance in evaluating the mitigating evidence available to him, and in deciding not to pursue further mitigating evidence, undermines confidence in the adversarial process of this case. In embarking on our review of the District Court's conclusions, we are guided by our most recent admonition on this subject:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle* v. *Isaac*, 456 U. S. 107, 133–134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland* v. *Washington*, 466 U. S., at 689.

The evidence that might have been presented would have disclosed that petitioner had an exceptionally unhappy and unstable childhood.[7] Most of this evidence was described by petitioner's mother, who testified at length at the habeas corpus hearing. At the age of 14 she married Burger's father, who was 16. She was divorced from petitioner's father when petitioner was nine years old. She remarried twice, and neither of petitioner's stepfathers wanted petitioner in the home; one of them beat his mother in petitioner's presence when he was 11 and the other apparently "got him involved with marijuana, and that was the whole point of his life, where the next bag was coming from, or the next bottle of beer. And, this was the kind of influence that he had." App. 91. When his mother moved from Indiana to Florida, petitioner ran away from his father and hitchhiked to Tampa. After he became involved in an auto accident, she returned him to Indiana where he was placed in a juvenile detention home until he was released to his father's custody. Except for one incident of shoplifting, being absent from school without permission, and being held in juvenile detention—none of which was brought to the jury's attention—petitioner apparently had no criminal record before entering the Army.

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[7] We have no doubt that this potential testimony would have been relevant mitigating evidence that the sentencer could not have refused to consider and could not have been precluded from considering had counsel sought to introduce it. See *Hitchcock* v. *Dugger*, 481 U. S. 393, 398–399 (1987); *Skipper* v. *South Carolina*, 476 U. S. 1, 4–5 (1986); *Eddings* v. *Oklahoma*, 455 U. S. 104, 114–116 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). In light of petitioner's youth at the time of the offense, evidence of his "neglectful, sometimes even violent, family background" and testimony that his "mental and emotional development were at a level several years below his chronological age" could not have been excluded by the state court. *Eddings*, 455 U. S., at 116. It is equally clear, however, that the undisputed relevancy of this information and the trial court's corresponding duty to allow its consideration have no bearing on the quite distinct question before us. That issue is whether counsel acted reasonably in deciding not to introduce the evidence out of apprehension that it would contribute little to his client's chances of obtaining a life sentence while revealing possibly damaging details about his past and allowing foreseeably devastating cross-examination.

Leaphart was aware of some, but not all, of this family history prior to petitioner's trial. He talked with petitioner's mother on several occasions,[8] an attorney in Indiana who

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[8] There was a conflict in the testimony with respect to the extent of these conversations which the District Court described in its first treatment of the issue as follows:

"Mrs. Foster testified that Mr. Leaphart made only very minimal efforts to discuss petitioner's case with her and to develop possible mitigating factors. Mr. Leaphart's account suggested that he had talked with Mrs. Foster several times and made adequate if hardly ideal inquiries. Mr. Leaphart's account is supported by his bill, which lists two conferences totaling three and a half hours prior to trial and four conferences of unstated duration prior to retrial. Defendant's Exhibits 1, 2. Thus, the Court must conclude that Mr. Leaphart's investigation appears to meet at least minimal professional standards." 513 F. Supp., at 796, n. 6.

On remand from the Court of Appeals, the District Court concluded:

"Interviews with Burger, Burger's mother, and an attorney who had befriended Burger and his mother, in addition to his consultation with a psychologist, and review of psychologists' reports obtained through Burger's mother convinced Leaphart that a more exhaustive investigation into had befriended petitioner and his mother, and a psychologist whom Leaphart had employed to conduct an examination of petitioner in preparation for trial. He reviewed psychologists' reports that were obtained with the help of petitioner's mother. *Id.*, at 50–51. He also interviewed Stevens and other men at Fort Stewart. *Id.*, at 51. Based on these interviews, Leaphart made the reasonable decision that his client's interest would not be served by presenting this type of evidence.

His own meetings with petitioner, as well as the testimony of the psychologist at the hearing on the admissibility of petitioner's confession, convinced Leaphart that it would be unwise to put petitioner himself on the witness stand. The record indicates that petitioner never expressed any remorse about his crime, and the psychologist's testimony indicates that he might even have bragged about it on the witness stand.[9] Leaphart formed the opinion that Burger enjoyed

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Burger's background would not be a profitable pursuit. He also concluded that presenting background and character evidence to the sentencing jury would have been at best unproductive, and at worst, harmful to his client." *Burger* v. *Kemp*, 753 F. 2d 930, 935 (CA11 1985) (footnotes omitted; citations to transcript of second sentencing hearing omitted).

[9] "Q. Do you have an opinion, based on your examination of Mr. Burger, both your use of Wechsler IQ test and your other examination, and based on your experience as a psychologist, do you have an opinion as to whether or not he could appreciate the consequences of the making of a confession?

"A. I would think he would enjoy the idea, frankly. This would be a great opportunity to display his psychopathological behavior. He'd probably shout in the wind as much as he could of all the things he might have done.

"Q. But could he appreciate the trouble or the consequences of, or the magnitude of what he was doing?

. . . . .

"A. His grade of deficiency with a relative IQ of 82 would not [be] beyond the concept of understanding right from wrong. His psychopathology would make him want to do wrong, basically within his structure. He's just as determined to do evil as a preacher is determined to do [good], if I could use that as an illustration. So in the concept of appreciating any talking about the crimes; he was worried that the jury might regard Burger's attitude on the witness stand as indifferent or worse. *Id.*, at 75–76. Quite obviously, as the District Court concluded, an experienced trial lawyer could properly have decided not to put either petitioner or the psychologist who had thus evaluated him in a position where he would be subjected to cross-examination that might be literally fatal. 753 F. 2d, at 935–936.

The other two witnesses that Leaphart considered using were petitioner's mother and the Indiana lawyer who had acted as petitioner's "big brother." Leaphart talked with the mother on several occasions and concluded that her testimony would not be helpful and might have been counterproductive. As the record stood, there was absolutely no evidence that petitioner had any prior criminal record of any kind. Her testimony indicates that petitioner had committed at least one petty offense. App. 90. The District Judge who heard all of the testimony that she would have given on direct examination at the sentencing hearing was not convinced that it would have aided petitioner's case; it was surely not unreasonable for Leaphart to have concluded that cross-examination might well have revealed matters of historical fact that would have harmed his client's chances for a life sentence.

The Indiana lawyer was willing to travel to Georgia to testify on petitioner's behalf, but nothing in the record describes the content of the testimony he might have given. Although Leaphart was unable to recall the details of the background information that he received from the Indiana lawyer, he testified that the information was not helpful to petitioner, *id.*, at 57, and the Indiana lawyer apparently

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confession he would make, it would be to him almost a compelling need, because any psychopath has no pleasure, has no joy unless he can at some point along the line let the world know of his behavior, which to most of us is very unseemingly." 1 Tr. 249–251 (first sentencing hearing).

agreed with that assessment. *Id.*, at 57–58. Consistently with that conclusion, petitioner's present counsel—even with the benefit of hindsight—has submitted no affidavit from that lawyer establishing that he would have offered substantial mitigating evidence if he had testified. Accordingly, while Leaphart's judgment may have been erroneous, the record surely does not permit us to reach that conclusion.

Finally, petitioner submitted several affidavits to the court to describe the evidence that Leaphart might have used if he had conducted a more thorough investigation. These affidavits present information about petitioner's troubled family background that could have affected the jury adversely by introducing facts not disclosed by his clean adult criminal record. The affidavits indicate that the affiants, had they testified, might well have referred on direct examination or cross-examination to his encounters with law enforcement authorities. For example, a former neighbor, Phyllis Russell, stated that petitioner's father did not want to associate with him when he "got into trouble and was on juvenile probation." 1 Record 142. Petitioner's uncle, Earnest Holtsclaw, narrated that petitioner "got involved with drugs" while in Florida. *Id.*, at 145. Cathy Russell Ray, petitioner's friend in junior high school, stated that "Chris's father was supposed to go with him to juvenile court to get a release so that he could join the service [Army]." *Id.*, at 149.

Even apart from their references to damaging facts, the papers are by no means uniformly helpful to petitioner because they suggest violent tendencies that are at odds with the defense's strategy of portraying petitioner's actions on the night of the murder as the result of Stevens' strong influence upon his will. For example, the District Judge pointed out:

> "In an affidavit submitted to this Court, petitioner's uncle attests that petitioner came from a broken home and that he was unwanted by his parents. He opined

> that Burger had a split personality. 'Sometimes [Burger] would be a nice, normal guy, then at times he would flip out and would get violent over nothing.' Affidavit of Earnest R. Holtcsclaw *[sic]* at 1–2; *see also* Affidavit of Cathy Russell Ray at 1 ('He had a hairtrigger temper. He would get mad and punch the walls. Once he broke his knuckles he got so ma[d].'). On one hand, a jury could react with sympathy over the tragic childhood Burger endured. On the other hand, since Burger's sanity was not in issue in this case, the prosecution could use this same testimony, after pointing out that petitioner was nevertheless responsible for his acts, to emphasize that it was this same unpredictable propensity for violence which played a prominent role in the death of Burger's victim. *See* note 6, *supra.* '[M]itigation . . . ,' after all, [m]ay be in the eye of the beholder.' *Stanley* v. *Zant*, 697 F. 2d 955, 969 & n. 11 (11th Cir. 1983) (footnote omitted)." 753 F. 2d, at 937–938, n. 7.

The record at the habeas corpus hearing does suggest that Leaphart could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." *United States* v. *Cronic*, 466 U. S. 648, 665, n. 38 (1984). We have decided that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U. S., at 690–691. Applying this standard, we agree with the courts below that counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment. It appears that he did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty. Having made this judgment, he reasonably determined that he need not undertake further investigation to locate witnesses who would make statements about Burger's past. We hold that the Court of Appeals complied with the directives of *Strickland:*

> "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*, at 691.

V

Petitioner has not established that "in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." *Id.*, at 690. He "has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *Id.*, at 700.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, and, as to Part II, JUSTICE POWELL joins, dissenting.

In *Strickland* v. *Washington*, 466 U. S. 668 (1984), this Court set forth the standards that are to govern a court's consideration of a criminal defendant's claims that he has been denied his Sixth Amendment right to effective assistance of counsel. Petitioner Burger presents two such claims in this case. I believe each claim meets those specified standards for establishing a constitutional violation. Each therefore calls for a grant of the federal habeas corpus relief sought by petitioner. Accordingly, I dissent from the Court's judgment that denies such relief.[1]

I

A

Petitioner's first claim rests on his right to conflict-free assistance of counsel. As long ago as *Glasser* v. *United States*, 315 U. S. 60 (1942), this Court recognized that such assistance is a component of the Sixth Amendment right to effective assistance of counsel. *Id.*, at 70. This right is so fundamental in our adversarial system of criminal justice that public defender offices in many jurisdictions have rules precluding representation of more than one of the criminal defendants involved in the same offense.[2] Under the Federal Rules of Criminal Procedure[3] and under the rules governing professional responsibility,[4] consent of a criminal defendant

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[1] I agree with the Court's conclusion, *ante*, at 782, n. 5, that the Court of Appeals should be affirmed to the extent it held that any impermissible effect of the jury instruction on malice given at the guilt/innocence phase of trial was harmless beyond a reasonable doubt. See 785 F. 2d 890 (CA11), clarified, 796 F. 2d 1313 (1986). I also agree with the Court's observation, *ante*, at 779, n. 1, that petitioner has not advanced here the question of the constitutionality of executing a person for a murder committed while he was a minor, and thus there is no need to address the merits of that issue or the availability of the claim to petitioner in a future proceeding.

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[2] In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), this Court noted that the vast majority of public defender offices have a strong policy against multiple representation and that approximately half never undertake such representation. *Id.*, at 346, n. 11; see also Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 950, and n. 40 (1978). We further observed in *Cuyler* that the private bar may be less aware of conflicts of interests in such instances. 446 U. S., at 346, n. 11. This observation certainly is supported by the testimony of petitioner's attorney in this case that he never even considered that a conflict might arise out of the representation of two defendants facing the death penalty for the commission of the same murder. See App. 32–34.

[3] Criminal Rule 44(c) provides in relevant part:

"Whenever two or more defendants have been jointly charged . . . and are represented by . . . retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation."

[4] Ethical Canon 5–16 of the ABA Code of Professional Responsibility states:

"In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus, before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent."

Disciplinary Rule 5–105(D) states:

"If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

See also ABA Model Rules of Professional Conduct 1.7 and 1.10(a) (1984). The American Bar Association, in its Standards for Criminal Justice, explains:

"Except for preliminary matters such as initial hearings or applications for bail, *a lawyer or lawyers who are associated in practice* should not undertake to defend more than one defendant in the same criminal case if the is a necessary prerequisite to joint representation, and trial court inquiry into whether the defendant has made a knowing and voluntary waiver of his right to conflict-free representation is strongly encouraged, if not required.[5] I do not read

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duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants *except in unusual situations when, after careful investigation, it is clear that:*

"(i) no conflict is likely to develop;

"(ii) the several defendants give an informed consent to such multiple representation;

"(iii) the consent of the defendants is made a matter of judicial record. "In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients.

"In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct." ABA Standards for Criminal Justice 4-3.5(b) (2d ed. 1979) (emphases in original).

In *Strickland* v. *Washington*, 466 U. S. 668 (1984), this Court stated that the Sixth Amendment relies upon the "legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.*, at 688. Where, as here, the legal profession's standards were not followed, no such presumption is appropriate.

[5] Subsequent to petitioner's trial, the Georgia Supreme Court, exercising its supervisory authority, adopted a rule that in capital cases codefendants *must* be provided with separate and independent counsel. *Fleming* v. *State*, 246 Ga. 90, 270 S. E. 2d 185, cert. denied, 449 U. S. 904 (1980). The court cited the provision in the Code of Professional Responsibility that requires that any lawyer affiliated in a firm with a lawyer who is disqualified must also be disqualified, and thereby indicated that the rule applies to representation by a single attorney or by members of the same firm. 246 Ga., at 93, n. 7, 270 S. E. 2d, at 188, n. 7. The court explained that a rule of separate and independent representation "is especially necessary where the death penalty is sought, because in these cases even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase." *Id.*, at 93, 270 S. E. 2d, at 188; see also *id.*, at 95, 270 S. E. 2d, at 189 (Bowles, J., concurring) ("No two defendants share

the majority opinion as departing from the Court's earlier approval of those practices, see *Cuyler* v. *Sullivan*, 446 U. S. 335, 346, nn. 10 and 11 (1980), although I believe that in this case it definitely has misapplied the Sixth Amendment standard that is informed by the rules.

This Court recognizes the unique nature of claims that arise out of a conflict of interest and does not impose on such claims the two-pronged standard of inadequate performance and prejudice, see *Strickland* v. *Washington*, 466 U. S., at 687, that applies to general claims of ineffective assistance. Instead, prejudice is presumed if a defendant demonstrates that his attorney "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.*, at 692, quoting *Cuyler* v. *Sullivan*, 446 U. S., at 350, 348.[6]

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equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibility of plea bargaining"). But see *id.*, at 95, 97, 270 S. E. 2d, at 189, 191 (Hill, J., concurring specially) (cautioning that although presumption against joint representation is appropriate, a *per se* rule against joint representation may not be because capital defendants should be able to waive right to conflict-free representation if it would be to their benefit); *id.*, at 98, 270 S. E. 2d, at 191 (Jordan, P. J., dissenting) (arguing that defendant in that case should be permitted opportunity to make informed and voluntary waiver of right to conflict-free representation).

What happened in petitioner's case is therefore unlikely to be repeated in Georgia.

[6] The distinction between a prejudice showing and a showing of adverse effect on an attorney's performance apparently has been difficult for some courts to discern. See generally Note, Conflicts of Interest in the Representation of Multiple Criminal Defendants: Clarifying *Cuyler* v. *Sullivan*, 70 Geo. L. J. 1527, 1536–1561 (1982). The Court's decision in *Strickland* v. *Washington*, made clear, however, that demonstrating that a conflict adversely affected counsel's performance does not equate with the standard applied to general ineffectiveness claims that requires a showing that "there is a reasonable probability that, but for counsel's unpro-

The presumption of prejudice in cases presenting a conflict of interest that adversely affected counsel's performance is warranted because the duty of loyalty to a client is "perhaps the most basic" responsibility of counsel and "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland* v. *Washington*, 466 U. S., at 692. This difficulty in assessing prejudice resulting from a conflict of interest is due in part to the fact that the conflict may affect almost any aspect of the lawyer's preparation and presentation of the case. Because the conflict primarily compels the lawyer *not* to pursue certain arguments or take certain actions, it is all the more difficult to discern its effect. See *Holloway* v. *Arkansas*, 435 U. S. 475, 490 (1978) ("[I]n a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process" (emphasis in original)). The presumption of prejudice in conflict-of-interest cases is particularly appropriate because lawyers are charged with the knowledge that they are obliged to avoid such conflict. See n. 4, *supra*. A judge can avoid the problem by questioning the defendant, at an early stage of the criminal process, in any case presenting a situation that may give rise to conflict, in order to determine whether the defendant is aware of the possible conflict and whether he has waived his right to conflict-free representation.

B

Although the Court purports to apply this conflict-of-interest ineffectiveness standard in the present case, see *ante*, at

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fessional errors, the result of the proceeding would have been different." 466 U. S., at 694. The adverse-effect standard is necessary in conflict-of-interest cases to trigger the presumption of prejudice because such a presumption in these cases is of a more limited nature than the automatic presumption of prejudice that arises in cases of actual or constructive denial of the assistance of counsel altogether and cases of state interference with assistance of counsel. *Id.*, at 692.

783, I cannot agree with its conclusions. Contrary to the Court's reasoning, there simply can be no doubt that petitioner's court-appointed attorney actively represented conflicting interests through his role in the defenses of petitioner and his coindictee, Thomas Stevens. Defense counsel was appointed to represent petitioner, and his partner in their two-partner law firm was appointed to represent Stevens. App. 30–31. The two lawyers interviewed both defendants "from the beginning" and assisted in the preparation of both cases. *Id.*, at 32. The partner "sat in" with counsel at petitioner's trial and "helped" him. *Id.*, at 35. Apparently, others viewed the two lawyers as joint counsel for petitioner at his first trial inasmuch as the prosecutor directed the attention of the prospective jurors during *voir dire* to both lawyers and asked the jurors whether they ever had been represented by either of them. First Tr. 28, 37, 42, 48.[7] The partner is listed as appearing for petitioner Burger in the transcript of that trial. *Id.*, at 1. While there is no record evidence that petitioner's counsel assisted during Stevens' trial, counsel conceded that, in addition to his assistance in pretrial research, strategy, and interviews of Stevens, he prepared the appellate briefs for both petitioner and Stevens after the second sentencing proceedings. App. 54. See *Burger* v. *Kemp*, 753 F. 2d 930, 941 (CA11 1985) (District Court opinion, adopted by Court of Appeals as its own, noting that "it may be said that the two attorneys at times acted as one while each prepared for trial and appeal"). The facts therefore demonstrate that the two lawyer-partners actively represented both petitioner and Stevens.

This active representation of the two coindictees by petitioner's counsel constituted representation of actual conflicting interests.[8] Petitioner's and Stevens' interests were diametrically opposed on the issue that counsel considered to be crucial to the outcome of petitioner's case—the comparative culpability of petitioner and Stevens. Petitioner confessed to participation in the crime but placed the primary blame on Stevens. Second Tr. 278. In his confession, petitioner stated that he thought they simply would abandon the taxicab. *Ibid.* Botsford, who had been with petitioner and Stevens in the taxicab for a while, corroborated petitioner's statement in his testimony at both petitioner's and Stevens' trials. When questioned about what petitioner and Stevens had told him they were going to do with the taxicab and its driver, Botsford replied:

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[7] The transcripts of petitioner's first trial, including his first sentencing hearing, and of his second sentencing hearing were submitted as Exhibit A and Exhibit C, respectively, to respondent's answer to petitioner's federal habeas corpus petition in District Court. See 1 Record, pleading 11. Citations to the transcript of the first trial and hearing are designated "First Tr." and citations to the second hearing are designated as "Second Tr."

> "Well, Tom Stevens said that he thought they should kill him. And, I told him I thought he was crazy. And, Burger didn't like the idea of killing him either. Burger said that they ought to let him go, that they ought to drive off in the woods somewhere and let him out, and then take the car somewhere and put it like, I think somebody mentioned the ocean." *Id.*, at 112–113; see also First Tr. 100, 111 (Botsford agreeing that petitioner "was just sorta going along, sorta doing sorta like Stevens was telling him to do").

Petitioner stated that after he had checked to see if the driver was all right, Stevens returned to where they had stopped the taxicab and told petitioner to drive the car into the pond. Second Tr. 278. Stevens also confessed, but in doing so he pointed to petitioner as the more culpable. See *Stevens* v. *State*, 242 Ga. 34, 35, 247 S. E. 2d 838, 840 (1978). Stevens stated in his confession that he had not wanted to kill the taxicab driver and had not known that petitioner was planning to drive the automobile into the pond. *Ibid.* Stevens' attempt to argue his lesser culpability was his "sole mitigatory defense" at his second sentencing trial. See *Stevens* v. *State*, 245 Ga. 583, 585, 266 S. E. 2d 194, 197, cert. denied, 449 U. S. 891 (1980).

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[8] The great degree of deference the Court accords the lower courts' conclusions on this matter, *ante*, at 784–785, and its emphasis on the "heavily fact-based rulings," *ante*, at 785, appear misplaced in the analysis of this case. The question of multiple representation "is a mixed determination of law and fact that requires the application of legal principles to the historical facts," *Cuyler* v. *Sullivan*, 446 U. S., at 342, as are the general ineffectiveness question and the "performance and prejudice components of the ineffectiveness inquiry." *Strickland* v. *Washington*, 466 U. S., at 698.

The Court disregards this direct conflict between petitioner's and Stevens' respective interests and, instead, attempts to minimize the active representation of both defendants by the two lawyer-partners. The Court opines that the "overlap of counsel" did not constitute an "active representation of competing interests" by petitioner's counsel. *Ante*, at 783. The Court supports this assertion by blandly relying on its perception of a shortage of lawyers to handle these cases, on its view of the benefits that defendants may derive from joint representation when there is a common defense, and on the assumption that lawyers are aware of their duty of loyalty to clients. *Ante*, at 783–784. The Court, however, does not identify any record evidence indicating that there were no other lawyers available for appointment. In addition, the other factors are of questionable relevance in this case which did *not* involve a common defense for the two coindictees and in which counsel did not even consider that a conflict of interest might exist.

The Court also points to the fact that petitioner and Stevens were tried separately and relies on the observation in *Cuyler* v. *Sullivan*, 446 U. S., at 347, that separate trials in that case had "reduced the potential for a divergence in [the defendants'] interests." *Ante*, at 784. The separate trials in this case, however, did absolutely nothing to reduce the potential for divergence of interests at the two critical stages that petitioner argues were adversely affected by the conflict of interest, that is, pretrial plea negotiations and post-trial appeal.[9]

The Court's further attempt to disavow the existence of an actual conflict of interest by suggesting strategic reasons for the actions taken by petitioner's counsel on appeal and in pretrial negotiations is, with all respect, not supported by the record. The Court's suggestion that counsel's failure to make a "lesser culpability" argument on appeal was the result of a sound strategic conclusion that the claim was weak, *ante*, at 784, is sheer speculation. As demonstrated by petitioner's confession and Botsford's testimony, the lesser culpability argument certainly did not lack an evidentiary foundation. This speculation that counsel dropped the claim after trial because it was a weak argument for appeal is counterintuitive. The lesser culpability argument would have been stronger on appeal than at trial. On appeal, the reviewing court had both cases before it at the same time and thus was in the actual position of being able to compare the cases at the time it reviewed the appropriateness of the sentences imposed.

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[9] The fact that defendants are given separate trials may eliminate some problems created by a conflict of interest, but severance does not alleviate numerous other dilemmas faced by lawyers representing two or more defendants charged and indicted together. See Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1380 (1981); Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 143–144 (1978). The right to conflict-free representation by counsel in pretrial and appellate proceedings of criminal cases may be as significant as such representation at trial. *Id.*, at 125–127. In an earlier discussion of the hazards of an attorney's representing more than one coindictee, the Court described the very conflicts that present themselves in this case:

"Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable. Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." *Holloway* v. *Arkansas*, 435 U. S. 475, 489 (1978).

Moreover, the speculation that counsel dropped the argument on appeal because of its weakness ignores the fact that comparative culpability is directly relevant to the statutorily mandated appellate review of capital cases in Georgia. The State's statute specifies that the Georgia Supreme Court's review of capital cases is to include consideration "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime *and the defendant*." Ga. Code Ann. § 17-10-35(c)(3) (1982) (emphasis added). The evidence and argument presented at trial concerning petitioner's role as a follower of Stevens' directions and petitioner's lesser involvement in the assaultive behavior prior to the murder would clearly be relevant on appeal under the terms of the statute. Hence, even if counsel did base his decision on the "strategic" reason suggested by the Court,[10] that decision was based on an erroneous view of the law and thus could not be reasonable.[11] See *Kimmelman* v. *Morrison*, 477 U. S. 365, 385 (1986) (counsel's judgment found to be contrary to prevailing professional norms because justifications offered by counsel reflected ignorance of the law or attempt to shift blame for inadequate preparation).

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[10] Contrary to the Court's speculation, counsel himself did not claim to have dropped the lesser culpability argument because of its weakness. Rather, he stated that he did not raise the issue of the difference in the culpability of the two coindictees in petitioner's appellate brief because, although he thought it was the key issue at trial, App. 64, he thought "that was a jury decision based on the evidence," *id.*, at 53, and that the only way he could see to raise the issue was on the theory of "lack of evidence to sustain the finding of the jury as to the—what punishment to give." *Id.*, at 54. This basis for the action certainly cannot be considered strategically sound because it reflects an erroneous legal interpretation of appellate review in capital cases in Georgia. By failing to argue on petitioner's behalf that he was less culpable than Stevens, counsel diminished the reliability of the Georgia Supreme Court's proportionality review in this case. This Court has held that proportionality review is an important component of the Georgia capital-sentencing system. See *Gregg* v. *Georgia*, 428 U. S. 153, 198, 204-206 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). Therefore, even if counsel's assistance on appeal had not been hindered by

Setting aside the speculation as to counsel's motive, it becomes clear that his joint representation of petitioner and Stevens precluded him, as a matter of professional responsibility, from pursuing the lesser culpability argument in petitioner's appellate brief. It would have been inconsistent with his duty of loyalty to Stevens to argue that the Georgia Supreme Court should reduce petitioner's sentence to life imprisonment because Stevens was the more culpable defendant who deserved the death sentence for this heinous murder.

It is difficult to imagine a more direct conflict than existed here, where counsel was preparing the appellate brief for petitioner at the same time that he was preparing the appellate brief for Stevens, and where the state statute specifies that one of the roles of that appellate process is to consider the comparative culpability and sentences of defendants involved in similar crimes. Counsel's abandonment of the

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an actual conflict of interest, one may well question whether his conduct in this regard met the minimal level of professional reasonableness.

[11] Counsel's self-serving declarations that he did not permit his representation of Stevens to affect his representation of petitioner cannot outweigh the conflict revealed by the record itself. Counsel is not a fully disinterested party to this proceeding due to the collateral consequences that could result from a determination that he rendered ineffective assistance of counsel. He certainly has an interest in disavowing any conflict of interest so that he may receive other court appointments that are a source of clients for the criminal defense work of the partners' practice. App. 44. The approximate $9,000 fee that counsel received in this case for his representation of petitioner was the largest the firm had ever received for a criminal case. *Ibid.* This payment, along with the payment received by the partner for his court appointment in the Stevens case, went into their firm account. *Id.*, at 31.

lesser culpability argument on appeal, the stage at which the two cases would be reviewed contemporaneously, is indicative of the "'struggle to serve two masters.'" See *Holloway* v. *Arkansas*, 435 U. S., at 482, quoting *Glasser* v. *United States*, 315 U. S., at 75. This record *compels* a finding that counsel's representation of the conflicting interests of petitioner and Stevens had an adverse effect on his performance as petitioner's counsel.

Defense counsel's representation of conflicting interests also placed him in an untenable position at an earlier stage of the proceedings—during pretrial plea bargaining. The two partners helped each other during that period with their two cases and, as part of the pretrial preparation, petitioner's counsel talked with both petitioner and Stevens "from the beginning." App. 32. Counsel was not in a position to negotiate with the prosecution to the detriment of Stevens. Although he asserted that he continually attempted to negotiate with the prosecutor on behalf of petitioner for a sentence of life imprisonment, he conceded that he never offered the prosecutor petitioner's testimony against Stevens. *Id.*, at 52, 74–75. Certainly, counsel was not reasonable in expecting a plea bargain if he was not offering the prosecutor the most significant bargaining chip he possessed—petitioner's testimony against Stevens.[12]

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[12] The Court discounts counsel's failure to offer the prosecutor petitioner's testimony against Stevens by stating that there is no indication that the prosecutor would have been receptive to the offer. *Ante*, at 785–786. The Court focuses on the strength of the evidence of petitioner's and Stevens' guilt and concludes that there is no reason to doubt that the prosecutor refused to discuss the matter prior to the first trial and insisted on seeking the death penalty after the remand of the case. *Ante*, at 786. This reasoning, however, misses the point of petitioner's argument. The question is whether the prosecutor would have insisted on seeking the death penalty against petitioner if counsel had attempted to persuade him otherwise by offering him petitioner's testimony against Stevens.

Although it is easy to assume that the prosecutor would not have indulged in plea bargaining in this case because of the significant evidence of

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I also disagree with the Court's rejection of petitioner's argument that the actual conflict of interest was aggravated by the widespread knowledge of the cases in the small area from which the jury was drawn. *Ante*, at 787–788. Juror knowledge that the two cases were being tried by local law part-

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guilt, that approach ignores the reality of bargaining in capital cases. The evidence of guilt is not the only factor prosecutors consider. Rather, the relevant factors include the aggravating and mitigating circumstances surrounding the case as well as practical considerations such as the cost of pursuing the death penalty. See Gross & Mauro, Patterns of Death, 37 Stan. L. Rev. 27, 106–107 (1984) ("Since death penalty prosecutions require large allocations of scarce prosecutorial resources, prosecutors must choose a small number of cases to receive this expensive treatment"). Such practical considerations might weigh even more heavily prior to a second capital-sentencing trial on remand from the state appellate court's reversal of the first death sentence. Furthermore, there may be collateral evidentiary considerations during the pretrial phase that warrant a plea to life imprisonment for one coindictee in exchange for evidence that will strengthen the other case. For example, in this case, if the prosecutor had thought that there was a likelihood that petitioner's counsel might prevail on his argument that petitioner's confession should be suppressed, and if petitioner's counsel had offered petitioner's testimony against Stevens, the prosecutor might have decided that rather than risk the possibility of his case against petitioner being destroyed by suppression of his confession, he would permit petitioner to plead to a life sentence in exchange for his testimony against Stevens and pursue the death sentence against Stevens.

Petitioner's attorney had the duty to serve his role in the adversary system and make an offer on petitioner's behalf to testify against Stevens if petitioner was willing to do so, and thereby avoid the possibility of being executed. Petitioner's burden of showing that the conflict of interest adversely affected his counsel's performance therefore was met. The Court's suggestion that whether the prosecutor would have accepted such an offer is the determinative factor verges on requiring a showing of prejudice which, of course, is inappropriate in the context of petitioner's conflict-of-interest claim. See n. 6, *supra*. Counsel's complete failure to offer petitioner's testimony against Stevens in a capital case of this nature where petitioner's lesser culpability was suggested not only by his own confession but was corroborated by testimony of the key witness, has to be below minimal professional standards.

ners on inconsistent theories could create a conflict of interest because, in order to preserve the credibility of their argument in either case, the lawyers would have to deny the validity of their contradictory approach in the other. A crucial feature in any case is the credibility of a defendant's lawyer in the minds of the jury.

The Court's observation that "the community would have had the same awareness that the theories were inherently inconsistent" if two unaffiliated lawyers had advanced the inconsistent defenses, *ante*, at 788, may well be true, but it says nothing of the difference that awareness could make in the community's view of the cooperating lawyer-partners' credibility. The Court fails to recognize that, although the credibility of two unaffiliated attorneys presenting inconsistent arguments would not be questioned, the credibility of two local law partners assisting each other in the two cases could well be questioned if it was known that the lawyers working together presented inconsistent theories in the separate cases. Obviously, a jury might suspect that, in one of the cases, the lawyers were pressing an argument they did not believe to be true.

The adverse effect of this conflict on credibility would have been magnified when petitioner's and Stevens' cases were remanded for the second sentencing proceeding and the blame-shifting arguments were repeated. By the time of the second sentencing hearing, the verdicts in the original trials and sentencing proceedings had become known to the community.[13] Where, as here, the community was aware that the same law partners together were representing two defendants in capital cases and that they were arguing inconsistent theories that placed the blame on that defendant who did not happen to be on trial at the moment, the lawyers' credibility and their effectiveness as counsel were significantly undermined.

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[13] Counsel testified that there were several newspaper accounts of the proceedings between the first and second sentencing hearings and that he was certain that the people in the community were aware of the sentence received at the first trial. App. 55. The record indicates that 23 out of the 35 persons who were asked during *voir dire* at the second sentencing hearing whether they had heard about the first trial responded affirmatively. Second Tr. 33–34, 40, 48. Counsel made no effort to question these prospective jurors about the extent of their knowledge of the earlier trials and whether it extended to the theories on which petitioner's and

D

Finally, I conclude that the trial court in this case erred in failing to inquire into whether petitioner knowingly and voluntarily had waived his constitutional right to conflict-free representation. When this Court, in its opinion in *Cuyler* v. *Sullivan*, addressed the question of the state trial court's duty to make such an inquiry, it specified: "*Unless the trial court knows or reasonably should know that a particular conflict exists*, the court need not initiate an inquiry." 446 U. S., at 347 (emphasis added). Here, the trial judge, who appointed the two defense counsel and who presided over both petitioner's trial and Stevens' trial, should have known of the conflict from the outset inasmuch as the two confessions, given before the two partners were appointed, were in direct conflict on the question as to which defendant was the prime architect of the crime. In any event, by the time the appeal was taken, the trial court, undoubtedly familiar with the role that comparative culpability plays in appellate review of capital cases under the Georgia statute, was well aware that the primary defense of each defendant against the death sentence was that the other was more culpable. It therefore was the court's obligation to inquire whether petitioner had consented to the joint representation with the knowledge of the possible conflicts of interests. See *Glasser* v. *United States*, 315 U. S., at 71 ("The trial court should protect the right of an accused to have the assistance of coun-

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Stevens' trials had been argued. Counsel also testified, in explanation of his failure to seek a change of venue, that he had expected that the jurors who sat at petitioner's trial would be aware of all the pretrial proceedings, including an unsuccessful effort for change of venue. App. 54–55.

sel"). The court could not properly rely on an assumption that petitioner had given knowing and voluntary consent once the judge became aware of the actual conflict, particularly where he was made aware during the suppression hearing that petitioner was a 17-year-old at the time of the appointment of counsel, had an IQ of 82, functioned at the level of a 12-year-old, and was diagnosed as having psychological problems. First Tr. 244, 245, 247–248.

II

Even if no conflict of interest existed in this case, I would still dissent from the Court's denial of relief because petitioner was deprived of the effective assistance of counsel in connection with his capital-sentencing proceeding. His counsel failed to investigate mitigating evidence and failed to present any evidence at the sentencing hearing despite the fact that petitioner was an adolescent with psychological problems and apparent diminished mental capabilities. I agree with the Court that the adversarial nature of Georgia's capital-sentencing proceedings is sufficiently similar to a trial that petitioner's claim is governed by the same standards that apply to general claims of ineffective assistance of counsel at trial. *Ante*, at 788; see *Strickland* v. *Washington*, 466 U. S., at 686–687. It is also important to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.*, at 690. Applying that standard to petitioner's claim in light of the record of this case yields a finding that the inaction by petitioner's lawyer was "outside the wide range of professionally competent assistance" and was prejudicial to petitioner. *Id.*, at 690, 692.

In *Strickland*, this Court specifically addressed counsel's duty to investigate. It explained:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after

> less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*, at 690–691.

See also *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986). The limitation counsel placed on his investigation of the evidence of petitioner's mental capabilities and psychological makeup despite the indications that petitioner had problems in these respects was not supported by reasonable professional judgment.

Counsel stated that he based his decision not to move the court for a complete psychological examination of petitioner on his prior experience with the mental hospital where, he assumed, petitioner would be sent for the examination. App. 62–63. He stated that "the results I've had with personnel at Central Hospital as far as the defense is concerned . . . hasn't been good at all." *Id.*, at 63. He added that he thought that any further examinations would yield the same psychopathic diagnosis reached by the psychologist who had examined petitioner once briefly and primarily to administer an IQ test for purposes of the hearing on whether petitioner's confession was admissible. *Ibid.*

Counsel's failure to request an examination because of what he considered to be a biased procedure constituted a breakdown in the adversarial process. If in fact the procedure for psychological examinations of an indigent criminal defendant in that jurisdiction was biased, the role of petitioner's counsel at least was to seek an alternative examination process or to challenge the biased procedure. Counsel's decision to forgo the psychological examination imperiled

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petitioner's ability to counter the prosecutor's argument that he deserved to be executed for his role in the murder and therefore undermined the reliability of the sentencing proceeding. Moreover, such a decision to proceed without the examination in a case in which an adolescent with indications of significant psychological problems and diminished mental capabilities faces the death penalty is contrary to professional norms of competent assistance. The usefulness of a thorough evaluation in a case where there are indications that the capital defendant has problems of that kind is obvious. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 116 (1982); cf. *Ake* v. *Oklahoma*, 470 U. S. 68 (1985).

Counsel's decision not to investigate petitioner's family or childhood background also was not within the range of professionally reasonable judgment. Viewed as of the time he decided not to get in touch with any family member or to investigate any place where petitioner had lived, counsel provided inadequate assistance. He relied on petitioner to suggest possible witnesses or mitigating evidence. But his question to petitioner whether he could produce evidence of "anything good about him," App. 51, hardly could be expected to yield information about petitioner's childhood and broken home. It is unlikely that in response to that question a defendant would volunteer the facts that his father threw him out of the house, that his mother did the same, that his stepfathers beat him and his mother, or that one stepfather involved him in drugs and alcohol at age 11. All this is mitigating evidence that could be highly relevant. See *Eddings* v. *Oklahoma*, 455 U. S., at 107. Furthermore, counsel testified that he spoke with petitioner perhaps "half a dozen times," the longest being "[p]robably about an hour." App. 51. These bare six hours provided counsel little time to discuss possible mitigating evidence for the sentencing proceeding because counsel surely also had to discuss in detail the circumstances surrounding petitioner's confession which he was challenging and all the other features of the

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guilt/innocence phase of the trial. Moreover, after petitioner's death sentence was vacated on appeal and the case was remanded, counsel did not perform any further investigation whatsoever during the 9-month period before the second hearing. He simply proceeded in the same manner that had resulted in petitioner's being sentenced to death at the first hearing. *Id.*, at 71.

The only reason counsel spoke to petitioner's mother at all was because she sought him out after learning elsewhere that her son was charged with murder. *Id.*, at 83. Even after petitioner's mother initiated the contact, counsel's conduct was inexplicable. He testified that he never explained the penalty phase of the trial to petitioner's mother or what evidence then could be presented. *Id.*, at 50. The Court finds reasonable counsel's decision not to have petitioner's mother testify because he concluded that her testimony might be counterproductive in that it might reveal a petty offense petitioner had committed. *Ante*, at 792. That decision is a prime example, however, of a strategic choice made after less-than-adequate investigation, which therefore is not supported by informed professional judgment. Counsel could not reasonably determine whether presenting character witnesses would pose a risk of disclosing past criminal behavior by petitioner without first determining whether there was any such criminal behavior. Although there is a reference in the record to an incident of shoplifting a candy bar, App. 90–91, and another reference to an automobile accident, *id.*, at 92–93, there is no indication that counsel ever determined whether petitioner in fact had a prior criminal record. The account provided by petitioner's mother of petitioner's hitchhiking to Florida to be with her after having been thrown out of his father's house and having to sell his shoes during the trip to get food, *id.*, at 92, may well have outweighed the relevance of any earlier petty theft.

I also find troubling the fact that defense counsel rejected the assistance of another lawyer (who had known petitioner) merely on the basis that the lawyer was black. *Id.*, at 57–58. The lawyer offered to come to Georgia at his own expense to provide what assistance he could. *Id.*, at 86. Counsel thought his assistance might have "an ill effect," however, on the trial of petitioner who is white. Counsel testified that he and the lawyer agreed that because of his race it was not wise to have the lawyer testify. *Id.*, at 58. I question whether this is a reasonable professional decision. The adversarial duty of petitioner's counsel was to pursue a means by which to present testimony from such a witness while doing his best to safeguard the trial from racial prejudice. See, *e. g.*, *Turner* v. *Murray*, 476 U. S. 28 (1986). Counsel apparently made no effort to investigate possible racial bias of petitioner's jury. App. 58–59. Like counsel's abandonment of the psychological investigation because of the suspected unfairness of the examination procedure, his surrender to the perceived risk of racial discrimination without any effort to eliminate that risk is inconsistent with his adversarial role and his responsibility to further the reliability of the court proceeding.

Acceptance of the unpleasant likelihood of racial prejudice in such a trial, however, does not justify counsel's failure to accept assistance from the lawyer in any number of ways, such as investigating petitioner's childhood background in Indianapolis where the lawyer had known petitioner. Testimony by petitioner's mother at the federal habeas corpus hearing revealed that when the lawyer was in law school he had worked in a volunteer "big brother" organization for men who spent time with children who did not have a father-son relationship or a big brother. *Id.*, at 85. He was undoubtedly familiar with some of petitioner's friends and family members there. The affidavits submitted at the federal hearing, 1 Record 139–157, indicate that many of those persons still reside in Indianapolis but were never approached by counsel. In sum, I reluctantly conclude that counsel fell short in his "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, 466 U. S., at 691. Application of the *Strickland* standard to this case convinces me that further investigation was compelled constitutionally because there was inadequate information on which a reasonable professional judgment to limit the investigation could have been made.[14]

Having concluded that the conduct of petitioner's lawyer in failing to pursue an investigation into petitioner's psychological problems or into his family and childhood background was professionally unreasonable, given the circumstances known to counsel at the time, I must also address the question whether this inadequate performance prejudiced petitioner. In my view, if more information about this adolescent's psychological problems, troubled childhood, and unfortunate family history had been available, "there is a reasonable probability that . . . the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland* v. *Washington*, 466 U. S., at 695.

I cannot refrain from remarking on the similarities between the evidence of petitioner's childhood and that presented in *Eddings* v. *Oklahoma*, 455 U. S., at 107. Recognizing there the force of such evidence in a decision whether an individual should be sentenced to die, this Court held that the death sentence had to be vacated and the case remanded for another sentencing proceeding where the sentencing authority would consider the mitigating evidence. *Id.*, at 115–117. Because the decision not to present such evidence to the sentencing authority in petitioner's case was not supported by reasonable professional judgments, the reliability of the capital-sentencing proceeding was undermined. But for defense counsel's disinterest in developing any mitigating evidence to permit an informed decision, there is a reasonable possibility that the outcome of the sentencing hearing would have been different. Counsel's conduct "so undermined the proper functioning of the adversarial process" that the sentencing hearing cannot "be relied on as having produced a just result." *Strickland* v. *Washington*, 466 U. S., at 686.

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[14] I agree with the observation in the dissenting opinion in the Court of Appeals that the defense "strategy" to make the prosecutor "prove his case," see App. 35, "is tantamount to no strategy at all; and reliance upon such a strategy in a capital sentencing proceeding, as an alternative to investigating and presenting available mitigating evidence, is patently unreasonable." *Burger* v. *Kemp*, 753 F. 2d 930, 946 (CA11 1985).

III

Petitioner was denied the effective assistance of counsel guaranteed by the Sixth Amendment due to his trial counsel's active representation of the conflicting interests of his co-indictee. Given the indications of petitioner's psychological problems and diminished mental capabilities known to petitioner's lawyer, counsel's failure to perform an investigation into those problems and into petitioner's background denied petitioner effective assistance of counsel at his capital-sentencing hearing. Petitioner is entitled to a new trial with conflict-free representation by counsel and to a new capital-sentencing hearing with effective assistance of counsel. I respectfully dissent from this Court's judgment denying relief.

JUSTICE POWELL, with whom JUSTICE BRENNAN joins, dissenting.

I join Part II of JUSTICE BLACKMUN's dissenting opinion. I would reverse the judgment of the Court of Appeals on the ground that counsel unreasonably failed to investigate and present to the sentencing jury available mitigating evidence that would have raised a substantial question whether the sentence of death should have been imposed on a seriously backward minor. I therefore do not reach the question whether there was a conflict of interest resulting from the fact that two law partners represented Burger and Stevens in their separate trials. I write separately to emphasize those aspects of Burger's claim that I find particularly troubling.

I

When he committed the crime for which he is now to be executed, Burger's physical age was 17 years. He had an IQ of 82, was functioning at the level of a 12-year-old, and possibly had suffered brain damage from beatings when he was younger. See *Burger* v. *Kemp*, 753 F. 2d 930, 957 (CA11 1985) (Johnson, J., dissenting). Testimony by Burger's mother at the federal habeas corpus hearing confirmed that his childhood was turbulent and filled with violence. App. 88–92; see *ante*, at 789–790. Affidavits from Burger's childhood friends also attested to his troubled upbringing. See *ante*, at 793.

Defense counsel knew something of these facts, although not the details. App. 51–52. Prior to the sentencing hearing, counsel had interviewed Burger, Burger's mother, and an attorney who had befriended Burger and his mother. He had also reviewed psychologists' reports provided by Burger's mother, and spoken to the psychologist who testified as to Burger's IQ and psychological maturity at the suppression hearing. 753 F. 2d, at 935. After this review, counsel made the judgment that presenting any evidence at sentencing in addition to Burger's chronological age and the facts of his degree of participation in the crimes "would not be to [Burger's] benefit." App. 49. See 753 F. 2d, at 935.[1]

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[1] Counsel testified:

"I felt the way to try that case was to take the evidence that was there and try to minimize Mr. Burger's participation in the crime. . . . I felt that case should have been tried on the facts and make the District Attorney—I say make him, use whatever rules of evidence to exclude those harmful facts, and then use the—my opinion in representing Burger was then use those facts to show that he was just there and was not entitled to be treated in the same manner as the person who was—who was the main actor in the thing. That he was a secondary, he was in a secondary position. Since there were two punishments in that particular situation, that he should be

II

In *Strickland* v. *Washington*, 466 U. S. 668 (1984), this Court held that a "defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components." *Id.*, at 687. First, the defendant must show that counsel's errors were so serious that his performance as the "counsel" guaranteed under the Sixth Amendment was deficient. Second, the defendant must show that he suffered prejudice because of counsel's performance. In the context of a capital sentence, the defendant must demonstrate "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.*, at 695.

A

In assessing the adequacy of counsel's performance, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*, at 690. But "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.*, at 690–691. Here, counsel did not believe that evidence of Burger's violent and disturbed family background would benefit his client because Burger "had been involved in a beating and a number of things that indicated violence and stuff at an earlier [age]." App. 49. Counsel's reason for not presenting the sentencing jury with evidence of Burger's mental and emotional imma-

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given the lesser of the two. I think that's the way that case should have been tried, and that's the way I tried it. And, I don't know of—today, if I had to go back and try it again I would do it in the same manner—I say in the same manner, much the same manner, using the same thing and hope I got a different jury. That's all. And, that's it." App. 63–64.

turity is ambiguous.[2] It appears that counsel believed that the only relevant testimony in mitigation of a capital sentence could have been "something like he was a good boy and went to church." *Id.*, at 63. Most telling is counsel's explanation of the type of mitigating evidence that would be relevant at the sentencing hearing: "anything good about him, anything—of course, it was my understanding that that is very broad. That you can generally put up anything you can find that is good about anybody in mitigation of the sentence." *Id.*, at 51.

Burger's stunted intellectual and emotional growth and the details of his tragic childhood are far from "good," and it is true that background information would have "indicated violence and stuff at an earlier [age]," *id.*, at 49. But this Court's decisions emphasize that mitigating evidence is not necessarily "good." Factors that mitigate an individual defendant's moral culpability "ste[m] from the diverse *frailties* of humankind." *Woodson* v. *North Carolina*, 428 U. S. 280,

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[2] Counsel testified:

"The particular psychologist I had was—gave Mr. Burger an I. Q. test and found it to be 82. And, he also was of the opinion that Mr. Burger was a sociopath with a psychopathic personality. And, on cross examination in the confession phase, this attorney asked, he commented to the effect, I can't remember the exact comment, sociopath was not crazy, he didn't belong in an insane asylum, and he wasn't—shouldn't be treated as a criminal because of his compulsive behavior. But, made something—well, you can't put them in an insane asylum because they will let him out. Didn't know what to do with him. I felt that would be—that and related questions would be asked in the presence of the jury, so I decided at that point not to use the testimony of the psychologist in that phase." *Id.*, at 62.

When asked whether he considered using a psychologist for something other than showing that Burger's confession was involuntary, counsel responded:

"I could have—if he had been of the opinion, you know, question of sanity, I could have used that instance, but he was not of that opinion. I did not see the benefit of going out and trying to find the sociologist, or psychologist to use in that particular trial in that particular place, because I did not think that that would be effective." *Id.*, at 63.

304 (1976) (plurality opinion of Stewart, POWELL, and STEVENS, JJ.) (emphasis added). In a capital case where the defendant is youthful—in fact, a child, measured by chronological,[3] emotional, or intellectual maturity—evidence of these facts is extraordinarily germane to the individualized inquiry that the sentencing jury constitutionally is required to perform. "[E]vidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant," *Eddings* v. *Oklahoma*, 455 U. S. 104, 115 (1982), "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring). See *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983) (defendant's mental illness perhaps should mitigate the penalty). This Court's previous observation bears emphasis:

> "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979)." *Eddings* v. *Oklahoma*, *supra*, at 115–116 (footnotes omitted).

See *Gallegos* v. *Colorado*, 370 U. S. 49, 54 (1962) (a 14-year-old "cannot be compared with an adult" when assessing the voluntariness of a confession). Where a capital defendant's chronological immaturity is compounded by "serious emotional problems, . . . a neglectful, sometimes even violent, family background, . . . [and] mental and emotional development . . . at a level several years below his chronological age," *id.*, at 116, the relevance of this information to the defendant's culpability, and thus to the sentencing body, is particularly acute. The Constitution requires that a capital-sentencing system reflect this difference in criminal responsibility between children and adults.

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[3] Although an individual may be held criminally responsible at the age of 13, Ga. Code Ann. § 16–3–1 (1984), the age of legal majority in Georgia is 18 years, § 39–1–1 (1982).

Where information at the sentencing stage in a capital case may be highly relevant, counsel's burden of justifying a failure to investigate or present it is similarly heightened. There is no indication that counsel understood the relevance, much less the extraordinary importance, of the facts of Burger's mental and emotional immaturity, and his character and background, that were not investigated or presented in this case. This evidence bears directly on Burger's culpability and responsibility for the murder and in fact directly supports the strategy counsel claimed to have deemed best—to emphasize the difference in criminal responsibility between the two participants in the crime. Absent an explanation that does not appear in this record, counsel's decision not to introduce—or even to discover—this mitigating evidence is unreasonable, and his performance constitutionally deficient.[4]

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[4] As the Court notes, *ante*, at 779–780, Alvin Leaphart, the appointed counsel who represented petitioner in the state courts, was an experienced and respected lawyer. In concluding there was ineffective assistance in this case, I do not question the Court's view. Any lawyer who has participated in litigation knows that judgment calls—particularly in a trial—cannot always be reasonable or correct. Moreover, this Court has not yet addressed the question presented in *Thompson* v. *State*, 724 P. 2d 780 (Okla. Crim. App. 1986), cert. granted, 479 U. S. 1084 (1987), whether the Eighth Amendment imposes an age limitation on the application of the death penalty. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 110, n. 5 (1982).

I also share the concern expressed by Judge Edenfield in *Blake* v. *Zant*, 513 F. Supp. 772, 802, n. 13 (SD Ga. 1981), that the routine raising of charges of ineffective assistance of counsel is likely to have a significant

B

Imposing the death penalty on an individual who is not yet legally an adult is unusual and raises special concern.[5] At

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"chilling effect" on the willingness of experienced lawyers to undertake the defense of capital cases. See *ante*, at 780, n. 2. In this case, however, I conclude that the facts and circumstances that no one now disputes clearly show that counsel made a serious mistake of judgment in failing fully to develop and introduce mitigating evidence that the Court concedes was "relevant" and that the jury would have been compelled "to consider." See *ante*, at 789, n. 7.

[5] We noted in *Eddings* v. *Oklahoma* that "[e]very State in the country makes some separate provision for juvenile offenders." 455 U. S., at 116, n. 12 (citing *In re Gault*, 387 U. S. 1, 14 (1967)). Of the 37 States that have enacted capital-punishment statutes since this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), 11 prohibit the execution of persons under 18 at the time of the offense. Three States impose a prohibition at age 17, and Nevada sets its limit at age 16. Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleveland State L. Rev. 363, 368–369, and nn. 33–36 (1986). Of the States permitting imposition of the death penalty on juveniles, over half of them explicitly denominate youth as a mitigating factor. The American Law Institute's Model Penal Code capital-punishment statute states an exclusion for defendants "under 18 years of age at the time of the commission of the crime." § 210.6(1)(d) (1980). The Institute reasons "that civilized societies will not tolerate the spectacle of execution of children, and this opinion is confirmed by the American experience in punishing youthful offenders." *Id.*, Comment, p. 133. In 1983, the American Bar Association adopted a resolution stating that the organization "oppo[ses], in principle, the imposition of capital punishment on any person for an offense committed while that person was under the age of 18." See ABA Opposes Capital Punishment for Persons under 18, 69 A. B. A. J. 1925 (1983).

International opinion on the issue is reflected in Article 6 of the International Covenant on Civil and Political Rights and the American Convention on Human Rights. See United Nations, Human Rights, A Compilation of International Instruments 9 (1983). See also Weissbrodt, United States Ratification of the Human Rights Covenants, 63 Minn. L. Rev. 35, 40 (1978). Both prohibit the execution of individuals under the age of 18 at the time of their crime. The United States is not a party to either of these treaties, but at least 73 other nations have signed or ratified the International Covenant. See Weissbrodt, *supra*. All European countries forbid imposition of the death penalty on those under 18 at the time of their least, where a State permits the execution of a minor, great care must be taken to ensure that the minor truly deserves to be treated as an adult. A specific inquiry including "age, actual maturity, family environment, education, emotional and mental stability, and . . . prior record" is particularly relevant when a minor's criminal culpability is at issue. See *Fare* v. *Michael C.*, 442 U. S. 707, 734, n. 4 (1979) (POWELL, J., dissenting). No such inquiry occurred in this case. In every realistic sense Burger not only was a minor according to law, but clearly his mental capacity was subnormal to the point where a jury reasonably could have believed that death was not an appropriate punishment. Because there is a reasonable probability that the evidence not presented to the sentencing jury in this case would have affected its outcome, Burger has demonstrated prejudice due to counsel's deficient performance.

III

As I conclude that counsel's performance in this case was deficient, and the deficiency may well have influenced the sentence that Burger received, I would vacate Burger's death sentence and remand for resentencing.

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offense. Streib, *supra*, at 389 (citing Amnesty International, The Death Penalty (1979)).

NOLLAN ET UX. v. CALIFORNIA COASTAL COMMISSION

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 86-133. Argued March 30, 1987—Decided June 26, 1987

The California Coastal Commission granted a permit to appellants to replace a small bungalow on their beachfront lot with a larger house upon the condition that they allow the public an easement to pass across their beach, which was located between two public beaches. The County Superior Court granted appellants a writ of administrative mandamus and directed that the permit condition be struck. However, the State Court of Appeal reversed, ruling that imposition of the condition did not violate the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment.

Held:

1. Although the outright taking of an uncompensated, permanent, public-access easement would violate the Takings Clause, conditioning appellants' rebuilding permit on their granting such an easement would be lawful land-use regulation if it substantially furthered governmental purposes that would justify denial of the permit. The government's power to forbid particular land uses in order to advance some legitimate police-power purpose includes the power to condition such use upon some concession by the owner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. Pp. 831-837.

2. Here the Commission's imposition of the access-easement condition cannot be treated as an exercise of land-use regulation power since the condition does not serve public purposes related to the permit requirement. Of those put forth to justify it—protecting the public's ability to see the beach, assisting the public in overcoming a perceived "psychological" barrier to using the beach, and preventing beach congestion—none is plausible. Moreover, the Commission's justification for the access requirement unrelated to land-use regulation—that it is part of a comprehensive program to provide beach access arising from prior coastal permit decisions—is simply an expression of the belief that the public interest will be served by a continuous strip of publicly accessible beach. Although the State is free to advance its "comprehensive program" by exercising its eminent domain power and paying for access easements, it

cannot compel coastal residents alone to contribute to the realization of that goal. Pp. 838–842.

177 Cal. App. 3d 719, 223 Cal. Rptr. 28, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 842. BLACKMUN, J., filed a dissenting opinion, *post*, p. 865. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 866.

Robert K. Best argued the cause for appellants. With him on the briefs were *Ronald A. Zumbrun* and *Timothy A. Bittle*.

Andrea Sheridan Ordin, Chief Assistant Attorney General of California, argued the cause for appellee. With her on the brief were *John K. Van de Kamp*, Attorney General, *N. Gregory Taylor*, Assistant Attorney General, *Anthony M. Summers*, Supervising Deputy Attorney General, and *Jamee Jordan Patterson*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Habicht*, *Deputy Solicitor General Ayer*, *Deputy Assistant Attorneys General Marzulla*, *Hookano*, and *Kmiec*, *Richard J. Lazarus*, and *Peter R. Steenland, Jr.*; and for the Breezy Point Cooperative by *Walter Pozen*.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Massachusetts et al. by *James M. Shannon*, Attorney General of Massachusetts, and *Lee P. Breckenridge* and *Nathaniel S. W. Lawrence*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *John Steven Clark* of Arkansas, *Joseph Lieberman* of Connecticut, *Charles M. Oberly* of Delaware, *Robert Butterworth* of Florida, *Warren Price III* of Hawaii, *Neil F. Hartigan* of Illinois, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Robert M. Spire* of Nebraska, *Stephen E. Merrill* of New Hampshire, *W. Cary Edwards* of New Jersey, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *Dave Frohnmayer* of Oregon, *James E. O'Neil* of Rhode Island, *W. J. Michael Cody* of Tennessee, *Jim Mattox* of Texas, *Jeffrey Amestoy* of Vermont, *Kenneth O. Eikenberry* of Washington, *Charles G. Brown* of West Virginia, and *Donald J. Hanaway* of Wisconsin;

JUSTICE SCALIA delivered the opinion of the Court.

James and Marilyn Nollan appeal from a decision of the California Court of Appeal ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986). The California court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. *Ibid.* We noted probable jurisdiction. 479 U. S. 913 (1986).

I

The Nollans own a beachfront lot in Ventura County, California. A quarter-mile north of their property is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as "the Cove," lies 1,800 feet south of their lot. A concrete seawall approximately eight feet high separates the beach portion of the Nollans' property from the rest of the lot. The historic mean high tide line determines the lot's oceanside boundary.

The Nollans originally leased their property with an option to buy. The building on the lot was a small bungalow, totaling 504 square feet, which for a time they rented to summer vacationers. After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.

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for the Council of State Governments et al. by *Benna Ruth Solomon* and *Joyce Holmes Benjamin;* for Designated California Cities and Counties by *E. Clement Shute, Jr.;* and for the Natural Resources Defense Council et al. by *Fredric D. Woocher.*

Briefs of *amici curiae* were filed for the California Association of Realtors by *William M. Pfeiffer;* and for the National Association of Home Builders et al. by *Jerrold A. Fadem, Michael M. Berger,* and *Gus Bauman.*

The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so, under Cal. Pub. Res. Code Ann. §§ 30106, 30212, and 30600 (West 1986), they were required to obtain a coastal development permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that their application had been placed on the administrative calendar, and that the Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side. This would make it easier for the public to get to Faria County Park and the Cove. The Nollans protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement. App. 31, 34.

On June 3, 1982, the Nollans filed a petition for writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition. They argued that the condition could not be imposed absent evidence that their proposed development would have a direct adverse impact on public access to the beach. The court agreed, and remanded the case to the Commission for a full evidentiary hearing on that issue. *Id.*, at 36.

On remand, the Commission held a public hearing, after which it made further factual findings and reaffirmed its imposition of the condition. It found that the new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit." *Id.*, at 58. The new house would also increase private use of the shorefront. *Id.*, at 59. These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront." *Id.*, at 65–66. Therefore the Commission could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property. The Commission also noted that it had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property. *Id.*, at 47–48.

The Nollans filed a supplemental petition for a writ of administrative mandamus with the Superior Court, in which they argued that imposition of the access condition violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. The Superior Court ruled in their favor on statutory grounds, finding, in part to avoid "issues of constitutionality," that the California Coastal Act of 1976, Cal. Pub. Res. Code Ann. §30000 *et seq.* (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea. App. 419. In the court's view, the administrative record did not provide an adequate factual basis for concluding that replacement of the bungalow with the house would create a direct or cumulative burden on public access to the sea. *Id.*, at 416–417. Accordingly, the Superior Court granted the writ of mandamus and directed that the permit condition be struck.

The Commission appealed to the California Court of Appeal. While that appeal was pending, the Nollans satisfied the condition on their option to purchase by tearing down the bungalow and building the new house, and bought the property. They did not notify the Commission that they were taking that action.

The Court of Appeal reversed the Superior Court. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986). It disagreed with the Superior Court's interpretation of the Coastal Act, finding that it required that a coastal permit for the construction of a new house whose floor area, height or bulk was more than 10% larger than that of the house it was replacing be conditioned on a grant of access. *Id.*, at 723–724, 223 Cal. Rptr., at 31; see Cal. Pub. Res. Code Ann. §30212. It also ruled that that requirement did not violate the Constitution under the reasoning of an earlier case of the Court of Appeal, *Grupe* v. *California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985). In that case, the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional. 177 Cal. App. 3d, at 723, 223 Cal. Rptr., at 30–31; see *Grupe*, *supra*, at 165–168, 212 Cal. Rptr., at 587–590; see also *Remmenga* v. *California Coastal Comm'n*, 163 Cal. App. 3d 623, 628, 209 Cal. Rptr. 628, 631, appeal dism'd, 474 U. S. 915 (1985). The Court of Appeal ruled that the record established that that was the situation with respect to the Nollans' house. 177 Cal. App. 3d, at 722–723, 223 Cal. Rptr., at 30–31. It ruled that the Nollans' taking claim also failed because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property. *Id.*, at 723, 223 Cal. Rptr., at 30; see *Grupe*, *supra*, at 175–176, 212 Cal. Rptr., at 595–596. Since, in the Court of Appeal's view, there was no statutory or constitutional obstacle to imposition of the access condition, the Superior Court erred in granting the writ of mandamus. The Nollans appealed to this Court, raising only the constitutional question.

II

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as JUSTICE BRENNAN contends) "a mere restriction on its use," *post*, at 848–849, n. 3, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. J. Sackman, 1 Nichols on Eminent Domain § 2.1[1] (Rev. 3d ed. 1985), 2 *id.*, § 5.01[5]; see 1 *id.*, § 1.42[9], 2 *id.*, § 6.14. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 433 (1982), quoting *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176 (1979). In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 U. S., at 432–433, n. 9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," *id.*, at 434–435. We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[1]

JUSTICE BRENNAN argues that while this might ordinarily be the case, the California Constitution's prohibition on any individual's "exclu[ding] the right of way to [any navigable] water whenever it is required for any public purpose," Art. X, § 4, produces a different result here. *Post*, at 847–848, see also *post*, at 855, 857. There are a number of difficulties with that argument. Most obviously, the right of way sought here is not naturally described as one *to* navigable water (from the street to the sea) but *along* it; it is at least highly questionable whether the text of the California Constitution has any prima facie application to the situation before us. Even if it does, however, several California cases suggest that JUSTICE BRENNAN's interpretation of the effect of the clause is erroneous, and that to obtain easements of access across private property the State must proceed through its eminent domain power. See *Bolsa Land Co.* v. *Burdick*, 151 Cal. 254, 260, 90 P. 532, 534–535 (1907); *Oakland* v. *Oakland Water Front Co.*, 118 Cal. 160, 185, 50 P. 277, 286 (1897); *Heist* v. *County of Colusa*, 163 Cal. App. 3d 841, 851, 213 Cal. Rptr. 278, 285 (1984); *Aptos Seascape Corp.* v. *Santa Cruz*, 138 Cal. App. 3d 484, 505–506, 188 Cal. Rptr. 191, 204–205 (1982). (None of these cases specifically addressed the argument that Art. X, § 4, allowed the public to cross private property to get to navigable water, but if that provision meant what JUSTICE BRENNAN believes, it is hard to see why it was not invoked.) See also 41 Op. Cal. Atty. Gen. 39, 41 (1963) ("In spite of the sweeping provisions of [Art. X, § 4], and the injunction therein to the Legislature to give its provisions the most liberal interpretation, the few reported cases in California have adopted the general rule that one may not trespass on private land to get to navigable tidewaters for the purpose of commerce, navigation or fishing"). In light of these uncertainties, and given the fact that, as JUSTICE BLACKMUN notes, the Court of Appeal did not rest its decision on Art. X, § 4, *post*, at 865, we should assuredly not take it upon ourselves to resolve this question of California constitutional law in the first instance. See, *e. g.*, *Jenkins* v. *Anderson*, 447 U. S. 231, 234, n. 1 (1980). That would be doubly inappropriate since the Commission did not advance this argument in the Court of Appeal, and the Nollans argued in the Superior Court that any claim that there was a pre-existing public right of access had to be asserted through a quiet title action, see Points and Authorities in Support of Motion for Writ of Administrative Mandamus, No. SP50805 (Super. Ct. Cal.), p. 20, which the Commission, possessing no claim to the easement itself, probably would not have had standing under California law to bring. See Cal. Code Civ. Proc. Ann. § 738 (West 1980).[2]

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[1] The holding of *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition permanent access was not required. The analysis of *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), is not inconsistent because it was affected by traditional doctrines regarding navigational servitudes. Of course neither of those cases involved, as this one does, a classic right-of-way easement.

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[2] JUSTICE BRENNAN also suggests that the Commission's public announcement of its intention to condition the rebuilding of houses on the transfer of easements of access caused the Nollans to have "no reasonable claim to any expectation of being able to exclude members of the public" from walking across their beach. *Post*, at 857–860. He cites our opinion in *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), as support for the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights. In *Monsanto*, however, we found merely that the Takings Clause was not violated by giving effect to the Government's announcement that application for "*the right to [the] valuable Government benefit*," *id.*, at 1007 (emphasis added), of obtaining registration

Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome. We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980). See also *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 127 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.[3] They have made clear, however, that a

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of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. *Id.*, at 1007–1008. See also *Bowen* v. *Gilliard*, *ante*, at 605. But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange," 467 U. S., at 1007, that we found to have occurred in *Monsanto*. Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

[3] Contrary to JUSTICE BRENNAN's claim, *post*, at 843, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980), not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." *Post*, at 843, quoting *Minnesota* v.

broad range of governmental purposes and regulations satisfies these requirements. See *Agins* v. *Tiburon, supra,* at 260–262 (scenic zoning); *Penn Central Transportation Co.* v. *New York City, supra* (landmark preservation); *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926) (residential zoning); Laitos & Westfall, Government Interference with Private Interests in Public Resources, 11 Harv. Envtl. L. Rev. 1, 66 (1987). The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so—in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction)[4] would substantially impede these pur-

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Clover Leaf Creamery Co., 449 U. S. 456, 466 (1981). JUSTICE BRENNAN relies principally on an equal protection case, *Minnesota* v. *Clover Leaf Creamery Co., supra*, and two substantive due process cases, *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 487–488 (1955), and *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952), in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962), does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.

[4] If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens

poses, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking. See *Penn Central Transportation Co.* v. *New York City, supra.*

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the

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which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960); see also *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 656 (1981) (BRENNAN, J., dissenting); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 123 (1978). But that is not the basis of the Nollans' challenge here.

owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." *J. E. D. Associates, Inc.* v. *Atkinson*, 121 N. H. 581, 584, 432 A. 2d 12, 14–15 (1981); see Brief for United States as *Amicus Curiae* 22, and n. 20. See also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S., at 439, n. 17.[5]

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[5] One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would

III

The Commission claims that it concedes as much, and that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards. The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them

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result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.[6] Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts. See *Parks* v. *Watson*, 716 F. 2d 646, 651–653 (CA9 1983); *Bethlehem Evangelical Lutheran Church* v. *Lakewood*, 626 P. 2d 668, 671–674 (Colo. 1981); *Aunt Hack Ridge Estates, Inc.* v. *Planning Comm'n*, 160 Conn. 109, 117–120, 273 A. 2d 880, 885 (1970); *Longboat Key* v. *Lands End, Ltd.*, 433 So. 2d 574 (Fla. App. 1983); *Pioneer Trust & Savings Bank* v. *Mount Prospect*, 22 Ill. 2d 375, 380, 176 N. E. 2d 799, 802 (1961); *Lampton* v. *Pinaire*, 610 S. W. 2d 915, 918–919 (Ky. App. 1980); *Schwing* v. *Baton Rouge*, 249 So. 2d 304 (La. App.), application denied, 259 La. 770, 252 So. 2d 667 (1971); *Howard County* v. *JJM, Inc.*, 301 Md. 256, 280–282, 482 A. 2d 908, 920–921 (1984); *Collis* v. *Bloomington*, 310 Minn. 5, 246 N. W. 2d 19 (1976); *State ex rel. Noland* v. *St. Louis County*, 478 S. W. 2d 363 (Mo. 1972);

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[6] As JUSTICE BRENNAN notes, the Commission also argued that the construction of the new house would "'increase private use immediately adjacent to public tidelands,'" which in turn might result in more disputes between the Nollans and the public as to the location of the boundary. *Post*, 851, quoting App. 62. That risk of boundary disputes, however, is inherent in the right to exclude others from one's property, and the construction here can no more justify mandatory dedication of a sort of "buffer zone" in order to avoid boundary disputes than can the construction of an addition to a single-family house near a public street. Moreover, a buffer zone has a boundary as well, and unless that zone is a "no-man's land" that is off limits for both neighbors (which is of course not the case here) its creation achieves nothing except to shift the location of the boundary dispute further on to the private owner's land. It is true that in the distinctive situation of the Nollans' property the seawall could be established as a clear demarcation of the public easement. But since not all of the lands to which this land-use condition applies have such a convenient reference point, the avoidance of boundary disputes is, even more obviously than the others, a made-up purpose of the regulation.

Billings Properties, Inc. v. *Yellowstone County*, 144 Mont. 25, 33–36, 394 P. 2d 182, 187–188 (1964); *Simpson* v. *North Platte*, 206 Neb. 240, 292 N. W. 2d 297 (1980); *Briar West, Inc.* v. *Lincoln*, 206 Neb. 172, 291 N. W. 2d 730 (1980); *J. E. D. Associates* v. *Atkinson*, 121 N. H. 581, 432 A. 2d 12 (1981); *Longridge Builders, Inc.* v. *Planning Bd. of Princeton*, 52 N. J. 348, 350–351, 245 A. 2d 336, 337–338 (1968); *Jenad, Inc.* v. *Scarsdale*, 18 N. Y. 2d 78, 218 N. E. 2d 673 (1966); *MacKall* v. *White*, 85 App. Div. 2d 696, 445 N. Y. S. 2d 486 (1981), appeal denied, 56 N. Y. 2d 503, 435 N. E. 2d 1100 (1982); *Frank Ansuini, Inc.* v. *Cranston*, 107 R. I. 63, 68–69, 71, 264 A. 2d 910, 913, 914 (1970); *College Station* v. *Turtle Rock Corp.*, 680 S. W. 2d 802, 807 (Tex. 1984); *Call* v. *West Jordan*, 614 P. 2d 1257, 1258–1259 (Utah 1980); *Board of Supervisors of James City County* v. *Rowe*, 216 Va. 128, 136–139, 216 S. E. 2d 199, 207–209 (1975); *Jordan* v. *Menomonee Falls*, 28 Wis. 2d 608, 617–618, 137 N. W. 2d 442, 447–449 (1965), appeal dism'd, 385 U. S. 4 (1966). See also *Littlefield* v. *Afton*, 785 F. 2d 596, 607 (CA8 1986); Brief for National Association of Home Builders et al. as *Amici Curiae* 9–16.

JUSTICE BRENNAN argues that imposition of the access requirement is not irrational. In his version of the Commission's argument, the reason for the requirement is that in its absence, a person looking toward the beach from the road will see a street of residential structures including the Nollans' new home and conclude that there is no public beach nearby. If, however, that person sees people passing and repassing along the dry sand behind the Nollans' home, he will realize that there is a public beach somewhere in the vicinity. *Post*, at 849–850. The Commission's action, however, was based on the opposite factual finding that the wall of houses completely blocked the view of the beach and that a person looking from the road would not be able to see it at all. App. 57–59.

Even if the Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would suffice. We do not share JUSTICE BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," *post*, at 862, that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

We are left, then, with the Commission's justification for the access requirement unrelated to land-use regulation:

> "Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment." App. 68.

That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," see U. S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Appellants in this case sought to construct a new dwelling on their beach lot that would both diminish visual access to the beach and move private development closer to the public tidelands. The Commission reasonably concluded that such "buildout," both individually and cumulatively, threatens public access to the shore. It sought to offset this encroachment by obtaining assurance that the public may walk along the shoreline in order to gain access to the ocean. The Court finds this an illegitimate exercise of the police power, because it maintains that there is no reasonable relationship between the effect of the development and the condition imposed.

The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century. Furthermore, even under the Court's cramped standard, the permit condition imposed in this case directly responds to the specific type of burden on access created by appellants' development. Finally, a review of those factors deemed most significant in takings analysis makes clear that the Commission's action implicates none of the concerns underlying the Takings Clause. The Court has thus struck down the Commission's reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in short, given appellants a windfall at the expense of the public.

I

The Court's conclusion that the permit condition imposed on appellants is unreasonable cannot withstand analysis. First, the Court demands a degree of exactitude that is inconsistent with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens. Second, even if the nature of the public-access condition imposed must be identical to the precise burden on access created by appellants, this requirement is plainly satisfied.

A

There can be no dispute that the police power of the States encompasses the authority to impose conditions on private development. See, *e. g., Agins* v. *Tiburon*, 447 U. S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978); *Gorieb* v. *Fox*, 274 U. S. 603 (1927). It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State *"could rationally have decided"* that the measure adopted might achieve the State's objective. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 466 (1981) (emphasis in original).[1] In this case, California has

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[1] See also *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 487–488 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952) ("Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare").

Nothwithstanding the suggestion otherwise, *ante*, at 834–835, n. 3, our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one. As we stated over 25 years ago in addressing a takings challenge to government regulation:

"The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton* v. *Steele*, 152 U. S. 133, 137 (1894), is still valid today: . . . '[I]t must appear, first, that the interests of the public . . . require [govern-employed its police power in order to condition development upon preservation of public access to the ocean and tidelands. The Coastal Commission, if it had so chosen, could have de-

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ment] interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature . . . .' *E. g.*, *Sproles* v. *Binford*, 286 U. S. 374, 388 (1932)." *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594–595 (1962).

See also *id.*, at 596 (upholding regulation from takings challenge with citation to, *inter alia*, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154 (1938), for proposition that exercise of police power will be upheld if "any state of facts either known or which could be reasonably assumed affords support for it"). In *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211 (1986), for instance, we reviewed a takings challenge to statutory provisions that had been held to be a legitimate exercise of the police power under due process analysis in *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984). *Gray*, in turn, had relied on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976). In rejecting the takings argument that the provisions were not within Congress' regulatory power, the Court in *Connolly* stated: "Although both *Gray* and *Turner Elkhorn* were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved." 475 U. S., at 223. Our phraseology may differ slightly from case to case—*e. g.*, regulation must "substantially advance," *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980), or be "reasonably necessary to," *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 127 (1978), the government's end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.

Of course, government action may be a valid exercise of the police power and still violate specific provisions of the Constitution. JUSTICE SCALIA is certainly correct in observing that challenges founded upon these provisions are reviewed under different standards. *Ante*, at 834–835, n. 3. Our consideration of factors such as those identified in *Penn Central*, *supra*, for instance, provides an analytical framework for protecting the values underlying the Takings Clause, and other distinctive approaches are utilized to give effect to other constitutional provisions. This is far different, however, from the use of different standards of review to address the threshold issue of the rationality of government action.

nied the Nollans' request for a development permit, since the property would have remained economically viable without the requested new development.[2] Instead, the State sought to accommodate the Nollans' desire for new development, on the condition that the development not diminish the overall amount of public access to the coastline. Appellants' proposed development would reduce public access by restricting visual access to the beach, by contributing to an increased need for community facilities, and by moving private development closer to public beach property. The Commission sought to offset this diminution in access, and thereby preserve the overall balance of access, by requesting a deed restriction that would ensure "lateral" access: the right of the public to pass and repass along the dry sand parallel to the shoreline in order to reach the tidelands and the ocean. In the expert opinion of the Coastal Commission, development conditioned on such a restriction would fairly attend to both public and private interests.

The Court finds fault with this measure because it regards the condition as insufficiently tailored to address the precise type of reduction in access produced by the new development. The Nollans' development blocks visual access, the Court tells us, while the Commission seeks to preserve lateral access along the coastline. Thus, it concludes, the State acted irrationally. Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government." *Sproles* v. *Binford*, 286 U. S. 374, 388 (1932). Cf. *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 491, n. 21 (1987) ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received"). As this Court long ago declared with regard to various forms of restriction on the use of property:

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[2] As this Court declared in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 127 (1985):

"A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."

We also stated in *Kaiser Aetna* v. *United States*, 444 U. S. 164, 179 (1979), with respect to dredging to create a private marina:

"We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation."

> "Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb*, 274 U. S., at 608 (citations omitted).

The Commission is charged by both the State Constitution and legislature to preserve overall public access to the California coastline. Furthermore, by virtue of its participation in the Coastal Zone Management Act (CZMA) program, the

State must "exercise effectively [its] responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone," 16 U. S. C. § 1452(2), so as to provide for, *inter alia*, "public access to the coas[t] for recreation purposes." § 1452(2)(D). The Commission has sought to discharge its responsibilities in a flexible manner. It has sought to balance private and public interests and to accept tradeoffs: to permit development that reduces access in some ways as long as other means of access are enhanced. In this case, it has determined that the Nollans' burden on access would be offset by a deed restriction that formalizes the public's right to pass along the shore. In its informed judgment, such a tradeoff would preserve the net amount of public access to the coastline. The Court's insistence on a precise fit between the forms of burden and condition on each individual parcel along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate.

The Court's demand for this precise fit is based on the assumption that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt. In fact, the situation is precisely the reverse: it is private landowners who are the interlopers. The public's expectation of access considerably antedates any private development on the coast. Article X, § 4, of the California Constitution, adopted in 1879, declares:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so

> that access to the navigable waters of this State shall always be attainable for the people thereof."

It is therefore private landowners who threaten the disruption of settled public expectations. Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose. In this case, however, the State has sought to protect *public* expectations of access from disruption by private land use. The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens.

Congress expressly stated in passing the CZMA that "[i]n light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate." 16 U. S. C. § 1451(h). It is thus puzzling that the Court characterizes as a "non-land-use justification," *ante*, at 841, the exercise of the police power to "'provide continuous public access along Faria Beach as the lots undergo development or redevelopment.'" *Ibid.* (quoting App. 68). The Commission's determination that certain types of development jeopardize public access to the ocean, and that such development should be conditioned on preservation of access, is the essence of responsible land-use planning. The Court's use of an unreasonably demanding standard for determining the rationality of state regulation in this area thus could hamper innovative efforts to preserve an increasingly fragile national resource.[3]

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[3] The list of cases cited by the Court as support for its approach, *ante*, at 839–840, includes no instance in which the State sought to vindicate preexisting rights of access to navigable water, and consists principally of cases involving a requirement of the dedication of land as a condition of subdivision approval. Dedication, of course, requires the surrender of

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Even if we accept the Court's unusual demand for a precise match between the condition imposed and the specific type of burden on access created by the appellants, the State's action easily satisfies this requirement. First, the lateral access condition serves to dissipate the impression that the beach that lies behind the wall of homes along the shore is for private use only. It requires no exceptional imaginative powers to find plausible the Commission's point that the average person passing along the road in front of a phalanx of imposing permanent residences, including the appellants' new home, is likely to conclude that this particular portion of the shore is not open to the public. If, however, that person can see that numerous people are passing and repassing along the dry sand, this conveys the message that the beach is in fact open for use by the public. Furthermore, those persons who go down to the public beach a quarter-mile away will be able to look down the coastline and see that persons have continuous access to the tidelands, and will observe signs that proclaim the public's right of access over the dry sand. The burden produced by the diminution in visual access—the impression that the beach is not open to the public—is thus directly alleviated by the provision for public access over the dry sand. The Court therefore has an

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ownership of property rather than, as in this case, a mere restriction on its use. The only case pertaining to beach access among those cited by the Court is *MacKall* v. *White*, 85 App. Div. 2d 696, 445 N. Y. S. 2d 486 (1981). In that case, the court found that a subdivision application could not be conditioned upon a declaration that the landowner would not hinder the public from using a trail that had been used to gain access to a bay. The trail had been used despite posted warnings prohibiting passage, and despite the owner's resistance to such use. In that case, unlike this one, neither the State Constitution, state statute, administrative practice, nor the conduct of the landowner operated to create any reasonable expectation of a right of public access.

unrealistically limited conception of what measures could reasonably be chosen to mitigate the burden produced by a diminution of visual access.

The second flaw in the Court's analysis of the fit between burden and exaction is more fundamental. The Court assumes that the only burden with which the Coastal Commission was concerned was blockage of visual access to the beach. This is incorrect.[4] The Commission specifically stated in its report in support of the permit condition that "[t]he Commission finds that the applicants' proposed development would present an increase in view blockage, *an increase in private use of the shorefront*, and that this impact would burden the public's ability to traverse to and along the shorefront." App. 65–66 (emphasis added). It declared that the possibility that "the public may get the impression that the beachfront is no longer available for public use" would be "due to *the encroaching nature of private use immediately adjacent to the public use, as well as* the visual 'block' of increased residential build-out impacting the visual quality of the beachfront." *Id.*, at 59 (emphasis added).

The record prepared by the Commission is replete with references to the threat to public access along the coastline resulting from the seaward encroachment of private development along a beach whose mean high-tide line is constantly shifting. As the Commission observed in its report: "The Faria Beach shoreline fluctuates during the year depending on the seasons and accompanying storms, and the public is not always able to traverse the shoreline below the mean high tide line." *Id.*, at 67. As a result, the boundary between publicly owned tidelands and privately owned beach is not a stable one, and "[t]he existing seawall is located very near to the mean high water line." *Id.*, at 61. When the beach is at its largest, the seawall is about 10 feet from the mean high-tide mark; "[d]uring the period of the year when the beach suffers erosion, the mean high water line appears to be located either on or beyond the existing seawall." *Ibid.* Expansion of private development on appellants' lot toward the seawall would thus "increase private use immediately adjacent to public tidelands, which has the potential of causing adverse impacts on the public's ability to traverse the shoreline." *Id.*, at 62. As the Commission explained:

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[4] This may be because the State in its briefs and at argument contended merely that the permit condition would serve to preserve overall public access, by offsetting the diminution in access resulting from the project, such as, *inter alia*, blocking the public's view of the beach. The State's position no doubt reflected the reasonable assumption that the Court would evaluate the rationality of its exercise of the police power in accordance with the traditional standard of review, and that the Court would not attempt to substitute its judgment about the best way to preserve overall public access to the ocean at the Faria Family Beach Tract.

> "The placement of more private use adjacent to public tidelands has the potential of creating use conflicts between the applicants and the public. The results of new private use encroachment into boundary/buffer areas between private and public property can create situations in which landowners intimidate the public and seek to prevent them from using public tidelands because of disputes between the two parties over where the exact boundary between private and public ownership is located. If the applicants' project would result in further seaward encroachment of private use into an area of clouded title, new private use in the subject encroachment area could result in use conflict between private and public entities on the subject shorefront." *Id.*, at 61–62.

The deed restriction on which permit approval was conditioned would directly address this threat to the public's access to the tidelands. It would provide a formal declaration of the public's right of access, thereby ensuring that the shifting character of the tidelands, and the presence of private development immediately adjacent to it, would not jeopardize enjoyment of that right.[5] The imposition of the permit condition was therefore directly related to the fact that appellants' development would be "located along a unique stretch of coast where lateral public access is inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline." *Id.*, at 68. The deed restriction was crafted to deal with the particular character of the beach along which appellants sought to build, and with the specific problems created by expansion of development toward the public tidelands. In imposing the restriction, the State sought to ensure that such development would not disrupt the historical expectation of the public regarding access to the sea.[6]

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[5] As the Commission's Public Access (Shoreline) Interpretative Guidelines state:

"[T]he provision of lateral access recognizes the potential for conflicts between public and private use and creates a type of access that allows the public to move freely along all the tidelands in an area that can be clearly delineated and distinguished from private use areas. . . . Thus the 'need' determination set forth in P[ublic] R[esources] C[ode] 30212(a)(2) should be measured in terms of providing access that buffers public access to the tidelands from the burdens generated on access by private development." App. 358–359.

[6] The Court suggests that the risk of boundary disputes "is inherent in the right to exclude others from one's property," and thus cannot serve as a purpose to support the permit condition. *Ante*, at 839, n. 6. The Commission sought the deed restriction, however, not to address a generalized problem inherent in any system of property, but to address the *particular* problem created by the shifting high-tide line along Faria Beach. Unlike the typical area in which a boundary is delineated reasonably clearly, the very problem on Faria Beach is that the boundary is *not* constant. The area open to public use therefore is frequently in question, and, as the discussion, *supra*, demonstrates, the Commission clearly tailored its permit condition precisely to address this specific problem.

The Court acknowledges that the Nollans' seawall could provide "a clear demarcation of the public easement," and thus avoid merely shifting "the location of the boundary dispute further on to the private owner's land." *Ibid.* It nonetheless faults the Commission because every property subject to regulation may not have this feature. This case, however, is a chal-

The Court is therefore simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development. Even were the Court desirous of assuming the added responsibility of closely monitoring the regulation of development along the California coast, this record reveals rational public action by any conceivable standard.

II

The fact that the Commission's action is a legitimate exercise of the police power does not, of course, insulate it from a takings challenge, for when "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). Conventional takings analysis underscores the implausibility of the Court's holding, for it demonstrates that this exercise of California's police power implicates none of the concerns that underlie our takings jurisprudence.

In reviewing a Takings Clause claim, we have regarded as particularly significant the nature of the governmental action and the economic impact of regulation, especially the extent to which regulation interferes with investment-backed expectations. *Penn Central*, 438 U. S., at 124. The character of the government action in this case is the imposition of a condition on permit approval, which allows the public to continue to have access to the coast. The physical intrusion permitted by the deed restriction is minimal. The public is permitted the right to pass and repass along the coast in an area from the seawall to the mean high-tide mark. App. 46. This area is at its *widest* 10 feet, *id.*, at 61, which means that *even without the permit condition*, the public's right of access permits it to pass on average within a few feet of the seawall. Passage closer to the 8-foot-high rocky seawall will make the

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lenge to the permit condition *as applied to the Nollans' property*, so the presence or absence of seawalls on other property is irrelevant.

appellants even less visible to the public than passage along the high-tide area farther out on the beach. The intrusiveness of such passage is even less than the intrusion resulting from the required dedication of a sidewalk in front of private residences, exactions which are commonplace conditions on approval of development.[7] Furthermore, the high-tide line shifts throughout the year, moving up to and beyond the seawall, so that public passage for a portion of the year would either be impossible or would not occur on appellant's property. Finally, although the Commission had the authority to provide for either passive or active recreational use of the property, it chose the least intrusive alternative: a mere right to pass and repass. *Id.*, at 370.[8] As this Court made clear in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980), physical access to private property in itself creates no takings problem if it does not "unreasonably impair the value or use of [the] property." Appellants can make no tenable claim that either their enjoyment of their property or its value is diminished by the public's ability merely to pass and repass a few feet closer to the seawall beyond which appellants' house is located.

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[7] See, *e. g.*, *Bellefontaine Neighbors* v. *J. J. Kelley Realty & Bldg. Co.*, 460 S. W. 2d 298 (Mo. Ct. App. 1970); *Allen* v. *Stockwell*, 210 Mich. 488, 178 N. W. 27 (1920). See generally Shultz & Kelley, Subdivision Improvement Requirements and Guarantees: A Primer, 28 Wash. U. J. Urban and Contemp. L. 3 (1985).

[8] The Commission acted in accordance with its Guidelines both in determining the width of the area of passage, and in prohibiting any recreational use of the property. The Guidelines state that it may be necessary on occasion to provide for less than the normal 25-foot-wide accessway along the dry sand when this may be necessary to "protect the privacy rights of adjacent property owners." App. 363. They also provide this advice in selecting the type of public use that may be permitted:

"*Pass and Repass.* Where topographic constraints of the site make use of the beach dangerous, where habitat values of the shoreline would be adversely impacted by public use of the shoreline or where the accessway may encroach closer than 20 feet to a residential structure, the accessway may be limited to the right of the public to pass and repass along the access area. For the purposes of these guidelines, pass and repass is defined as the right to walk and run along the shoreline. This would provide for public access along the shoreline but would not allow for any additional use of the accessway. Because this severely limits the public's ability to enjoy the adjacent state owned tidelands by restricting the potential use of the access areas, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner." *Id.*, at 370.

PruneYard is also relevant in that we acknowledged in that case that public access rested upon a "state constitutional . . . provision that had been construed to create rights to the use of private property by strangers." *Id.*, at 81. In this case, of course, the State is also acting to protect a state constitutional right. See *supra*, at 847–848 (quoting Art. X, §4, of California Constitution). The constitutional provision guaranteeing public access to the ocean states that "the Legislature shall enact such laws as will give *the most liberal construction to this provision* so that access to the navigable waters of this State shall be always attainable for the people thereof." Cal. Const., Art. X, §4 (emphasis added). This provision is the explicit basis for the statutory directive to provide for public access along the coast in new development projects, Cal. Pub. Res. Code Ann. §30212 (West 1986), and has been construed by the state judiciary to permit passage over private land where necessary to gain access to the tidelands. *Grupe* v. *California Coastal Comm'n*, 166 Cal. App. 3d 148, 171–172, 212 Cal. Rptr. 578, 592–593 (1985). The physical access to the perimeter of appellants' property at issue in this case thus results directly from the State's enforcement of the State Constitution.

Finally, the character of the regulation in this case is not unilateral government action, but a condition on approval of a development request submitted by appellants. The State has not sought to interfere with any pre-existing property interest, but has responded to appellants' proposal to intensify development on the coast. Appellants themselves chose to submit a new development application, and could claim no property interest in its approval. They were aware that approval of such development would be conditioned on preservation of adequate public access to the ocean. The State has initiated no action against appellants' property; had the Nollans' not proposed more intensive development in the coastal zone, they would never have been subject to the provision that they challenge.

Examination of the economic impact of the Commission's action reinforces the conclusion that no taking has occurred. Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a "reciprocity of advantage." *Pennsylvania Coal*, 260 U. S., at 415. Appellants have been allowed to replace a one-story, 521-square-foot beach home with a two-story, 1,674-square-foot residence and an attached two-car garage, resulting in development covering 2,464 square feet of the lot. Such development obviously significantly increases the value of appellants' property; appellants make no contention that this increase is offset by any diminution in value resulting from the deed restriction, much less that the restriction made the property less valuable than it would have been without the new construction. Furthermore, appellants gain an additional benefit from the Commission's permit condition program. They are able to walk along the beach beyond the confines of their own property only because the Commission has required deed restrictions as a condition of approving other new beach developments.[9] Thus, appellants benefit both as private landowners and as members of the public from the fact that new development permit requests are conditioned on preservation of public access.

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[9] At the time of the Nollans' permit application, 43 of the permit requests for development along the Faria Beach had been conditioned on deed restrictions ensuring lateral public access along the shoreline. App. 48.

Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development. Appellants submitted a proposal for more intensive development of the coast, which the Commission was under no obligation to approve, and now argue that a regulation designed to ameliorate the impact of that development deprives them of the full value of their improvements. Even if this novel claim were somehow cognizable, it is not significant. "[T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus* v. *Allard*, 444 U. S. 51, 66 (1979).

With respect to appellants' investment-backed expectations, appellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean. It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights. "[A]s a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes* v. *Washington*, 389 U. S. 290, 295 (1967) (Stewart, J., concurring). See also *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law"). In this case, the State Constitution explicitly states that no one possessing the "frontage" of any "navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose." Cal. Const., Art. X, §4. The state Code expressly provides that, save for exceptions not relevant here, "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects." Cal. Pub. Res. Code Ann. §30212 (West 1986). The Coastal Commission Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty requires that approval of new coastline development be conditioned upon provisions ensuring lateral public access to the ocean. App. 362. At the time of appellants' permit request, the Commission had conditioned all 43 of the proposals for coastal new development in the Faria Family Beach Tract on the provision of deed restrictions ensuring lateral access along the shore. *Id.*, at 48. Finally, the Faria family had leased the beach property since the early part of this century, and "the Faria family and their lessees [including the Nollans] had not interfered with public use of the beachfront within the Tract, so long as public use was limited to pass and repass lateral access along the shore." *Ibid.* California therefore has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights, and appellants have never acted as if it were. Given this state of affairs, appellants cannot claim that the deed restriction has deprived them of a reasonable expectation to exclude from their property persons desiring to gain access to the sea.

Even were we somehow to concede a pre-existing expectation of a right to exclude, appellants were clearly on notice when requesting a new development permit that a condition of approval would be a provision ensuring public lateral access to the shore. Thus, they surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward. In this respect, this case is quite similar to *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). In *Monsanto*, the respondent had submitted trade data to the Environmental Protection Agency (EPA) for the purpose of obtaining registration of certain pesticides. The company claimed that the agency's disclosure of certain data in accordance with the relevant regulatory statute constituted a taking. The Court conceded that the data in question constituted property under state law. It also found, however, that certain of the data had been submitted to the agency after Congress had made clear that only limited confidentiality would be given data submitted for registration purposes. The Court observed that the statute served to inform Monsanto of the various conditions under which data might be released, and stated:

> "If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission." *Id.*, at 1006–1007.

The Court rejected respondent's argument that the requirement that it relinquish some confidentiality imposed an unconstitutional condition on receipt of a Government benefit:

> "[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Id.*, at 1007.

The similarity of this case to *Monsanto* is obvious. Appellants were aware that stringent regulation of development along the California coast had been in place at least since 1976. The specific deed restriction to which the Commission sought to subject them had been imposed since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract. App. 48. Such regulation to ensure public access to the ocean had been directly authorized by California citizens in 1972, and reflected their judgment that restrictions on coastal development represented "'the advantage of living and doing business in a civilized community.'" *Andrus* v. *Allard*, *supra*, at 67, quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 422 (Brandeis, J., dissenting). The deed restriction was "authorized by law at the time of [appellants' permit] submission," *Monsanto, supra,* at 1007, and, as earlier analysis demonstrates, *supra,* at 849–853, was reasonably related to the objective of ensuring public access. Appellants thus were on notice that new developments would be approved only if provisions were made for lateral beach access. In requesting a new development permit from the Commission, they could have no reasonable expectation of, and had no entitlement to, approval of their permit application without any deed restriction ensuring public access to the ocean. As a result, analysis of appellants' investment-backed expectations reveals that "the force of this factor is so overwhelming . . . that it disposes of the taking question." *Monsanto, supra,* at 1005.[10]

Standard Takings Clause analysis thus indicates that the Court employs its unduly restrictive standard of police power rationality to find a taking where neither the character of governmental action nor the nature of the private interest affected raise any takings concern. The result is that the Court invalidates regulation that represents a reasonable adjustment of the burdens and benefits of development along the California coast.

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[10] The Court suggests that *Ruckelshaus* v. *Monsanto* is distinguishable, because government regulation of property in that case was a condition on receipt of a "government benefit," while here regulation takes the form of a restriction on "the right to build on one's own property," which "cannot remotely be described as a 'government benefit.'" *Ante,* at 834, n. 2. This proffered distinction is not persuasive. Both Monsanto and the Nollans hold property whose use is subject to regulation; Monsanto may not sell its property without obtaining government approval and the Nollans may not build new development on their property without government approval. Obtaining such approval is as much a "government benefit" for the Nollans as it is for Monsanto. If the Court is somehow suggesting that "the right to build on one's own property" has some privileged natural rights status, the argument is a curious one. By any traditional labor theory of value justification for property rights, for instance, see, *e. g.*, J. Locke, The Second Treatise of Civil Government 15–26 (E. Gough, ed. 1947), Monsanto would have a superior claim, for the chemical formulae which constitute its property only came into being by virtue of Monsanto's efforts.

III

The foregoing analysis makes clear that the State has taken no property from appellants. Imposition of the permit condition in this case represents the State's reasonable exercise of its police power. The Coastal Commission has drawn on its expertise to preserve the balance between private development and public access, by requiring that any project that intensifies development on the increasingly crowded California coast must be offset by gains in public access. Under the normal standard for review of the police power, this provision is eminently reasonable. Even accepting the Court's novel insistence on a precise *quid pro quo* of burdens and benefits, there is a reasonable relationship between the public benefit and the burden created by appellants' development. The movement of development closer to the ocean creates the prospect of encroachment on public tidelands, because of fluctuation in the mean high-tide line. The deed restriction ensures that disputes about the boundary between private and public property will not deter the public from exercising its right to have access to the sea.

Furthermore, consideration of the Commission's action under traditional takings analysis underscores the absence of any viable takings claim. The deed restriction permits the public only to pass and repass along a narrow strip of beach, a few feet closer to a seawall at the periphery of appellants' property. Appellants almost surely have enjoyed an increase in the value of their property even with the restriction, because they have been allowed to build a significantly larger new home with garage on their lot. Finally, appellants can claim the disruption of no expectation interest, both because they have no right to exclude the public under state law, and because, even if they did, they had full advance notice that new development along the coast is conditioned on provisions for continued public access to the ocean.

Fortunately, the Court's decision regarding this application of the Commission's permit program will probably have little ultimate impact either on this parcel in particular or the Commission program in general. A preliminary study by a Senior Lands Agent in the State Attorney General's Office indicates that the portion of the beach at issue in this case likely belongs to the public. App. 85.[11] Since a full study had not been completed at the time of appellants' permit application, the deed restriction was requested "without regard to the possibility that the applicant is proposing development on public land." *Id.*, at 45. Furthermore, analysis by the same Lands Agent also indicated that the public had obtained a prescriptive right to the use of Faria Beach from the seawall to the ocean. *Id.*, at 86.[12] The Superior Court explicitly stated in its ruling against the Commission on the permit condition issue that "no part of this opinion is intended to foreclose the public's opportunity to adjudicate the possibility that public rights in [appellants'] beach have been acquired through prescriptive use." *Id.*, at 420.

With respect to the permit condition program in general, the Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access produced by new development. Neither the Commission in its report nor the State in its briefs and at argument highlighted the particular threat to lateral access created by appellants' development project. In defending its action, the State emphasized the general point that *overall* access to the beach had been preserved, since the diminution of access created by the project had been offset by the gain in lateral access. This approach is understandable, given that the State relied on the reasonable assumption that its action was justified under the normal standard of review for determining legitimate exercises of a State's police power. In the future, alerted to the Court's apparently more demanding requirement, it need only make clear that a provision for public access directly responds to a particular type of burden on access created by a new development. Even if I did not believe that the record in this case satisfies this requirement, I would have to acknowledge that the record's documentation of the impact of coastal development indicates that the Commission should have little problem presenting its findings in a way that avoids a takings problem.

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[11] The Senior Lands Agent's report to the Commission states that "based on my observations, presently, most, if not all of Faria Beach waterward of the existing seawalls [lies] *below* the Mean High Tide Level, and would fall in public domain or sovereign category of ownership." App. 85 (emphasis added).

[12] The Senior Lands Agent's report stated:

"Based on my past experience and my investigation to date of this property it is my opinion that the area seaward of the revetment at 3822 Pacific Coast Highway, Faria Beach, as well as all the area seaward of the revetments built to protect the Faria Beach community, if not public owned, has been impliedly dedicated to the public for passive recreational use." *Id.*, at 86.

Nonetheless it is important to point out that the Court's insistence on a precise accounting system in this case is insensitive to the fact that increasing intensity of development in many areas calls for farsighted, comprehensive planning that takes into account both the interdependence of land uses and the cumulative impact of development.[13] As one scholar has noted:

> "Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is

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[13] As the California Court of Appeal noted in 1985: "Since 1972, permission has been granted to construct more than 42,000 building units within the land jurisdiction of the Coastal Commission. In addition, pressure for development along the coast is expected to increase since approximately 85% of California's population lives within 30 miles of the coast." *Grupe* v. *California Coastal Comm'n*, 166 Cal. App. 3d 148, 167, n. 12, 212 Cal. Rptr. 578, 589, n. 12. See also Coastal Zone Management Act, 16 U. S. C. § 1451(c) (increasing demands on coastal zones "have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion").

> more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user." Sax, Takings, Private Property, and Public Rights, 81 Yale L. J. 149, 152 (1971) (footnote omitted).

As Congress has declared: "The key to more effective protection and use of the land and water resources of the coastal zone [is for the states to] develo[p] land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance." 16 U. S. C. § 1451(i). This is clearly a call for a focus on the overall impact of development on coastal areas. State agencies therefore require considerable flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast. They should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck. Its reasoning is hardly suited to the complex reality of natural resource protection in the 20th century. I can only hope that today's decision is an aberration, and that a broader vision ultimately prevails.[14]

I dissent.

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[14] I believe that States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts will often be found to constitute a taking. "*If* . . . regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,'" however, I believe that compensation is the appropriate remedy for this constitutional violation. *San Diego Gas & Electric Co.* v. *San*

JUSTICE BLACKMUN, dissenting.

I do not understand the Court's opinion in this case to implicate in any way the public-trust doctrine. The Court certainly had no reason to address the issue, for the Court of Appeal of California did not rest its decision on Art. X, § 4, of the California Constitution. Nor did the parties base their arguments before this Court on the doctrine.

I disagree with the Court's rigid interpretation of the necessary correlation between a burden created by development and a condition imposed pursuant to the State's police power to mitigate that burden. The land-use problems this country faces require creative solutions. These are not advanced by an "eye for an eye" mentality. The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based. See, *e. g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 466 (1981). In my view, the easement exacted from appellants and the problems their development created are adequately related to the governmental interest in providing public access to the beach. Coastal development by its very nature makes public access to the shore generally more difficult. Appellants' structure is part of that general development and, in particular, it diminishes the public's visual access to the ocean and decreases the public's sense that it may have physical access to the beach. These losses in access can be counteracted, at least in part, by the condition on appellants' construction permitting public passage that ensures access along the beach.

Traditional takings analysis compels the conclusion that there is no taking here. The governmental action is a valid exercise of the police power, and, so far as the record reveals,

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Diego, 450 U. S. 621, 656 (1981) (BRENNAN, J., dissenting) (emphasis added). I therefore see my dissent here as completely consistent with my position in *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U. S. 304 (1987).

has a nonexistent economic effect on the value of appellants' property. No investment-backed expectations were diminished. It is significant that the Nollans had notice of the easement before they purchased the property and that public use of the beach had been permitted for decades.

For these reasons, I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The debate between the Court and JUSTICE BRENNAN illustrates an extremely important point concerning government regulation of the use of privately owned real estate. Intelligent, well-informed public officials may in good faith disagree about the validity of specific types of land-use regulation. Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence. Yet, because of the Court's remarkable ruling in *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U. S. 304 (1987), local governments and officials must pay the price for the necessarily vague standards in this area of the law.

In his dissent in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621 (1981), JUSTICE BRENNAN proposed a brand new constitutional rule.* He argued that a mistake such as the one that a majority of the Court believes that the California Coastal Commission made in this case should automatically give rise to pecuniary liability for a "temporary taking." *Id.*, at 653–661. Notwithstanding the unprecedented chilling effect that such a rule will obviously have on public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment and the public welfare, six Members of the Court recently endorsed JUSTICE BRENNAN's novel proposal. See *First English Evangelical Lutheran Church*, *supra*.

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*"The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 450 U. S., at 658.

I write today to identify the severe tension between that dramatic development in the law and the view expressed by JUSTICE BRENNAN's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. See *ante*, at 846–848. I like the hat that JUSTICE BRENNAN has donned today better than the one he wore in *San Diego*, and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in *First English* is a shortsighted one. Like JUSTICE BRENNAN, I hope that "a broader vision ultimately prevails." *Ante*, at 864.

I respectfully dissent.

GRIFFIN *v.* WISCONSIN

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 86-5324. Argued April 20, 1987—Decided June 26, 1987

Wisconsin law places probationers in the legal custody of the State Department of Health and Social Services and renders them "subject to . . . conditions set by the . . . rules and regulations established by the department." One such regulation permits any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are "reasonable grounds" to believe the presence of contraband. In determining whether "reasonable grounds" exist, an officer must consider a variety of factors, including information provided by an informant, the reliability and specificity of that information, the informant's reliability, the officer's experience with the probationer, and the need to verify compliance with the rules of probation and with the law. Another regulation forbids a probationer to possess a firearm without a probation officer's advance approval. Upon information received from a police detective that there were or might be guns in petitioner probationer's apartment, probation officers searched the apartment and found a handgun. Petitioner was tried and convicted of the felony of possession of a firearm by a convicted felon, the state trial court having denied his motion to suppress the evidence seized during the search after concluding that no warrant was necessary and that the search was reasonable. The State Court of Appeals and the State Supreme Court affirmed.

Held:

1. The warrantless search of petitioner's residence was "reasonable" within the meaning of the Fourth Amendment because it was conducted pursuant to a regulation that is itself a reasonable response to the "special needs" of a probation system. Pp. 872–880.

(a) Supervision of probationers is a "special need" of the State that may justify departures from the usual warrant and probable-cause requirements. Supervision is necessary to ensure that probation restrictions are in fact observed, that the probation serves as a genuine rehabilitation period, and that the community is not harmed by the probationer's being at large. Pp. 873–875.

(b) The search regulation is valid because the "special needs" of Wisconsin's probation system make the warrant requirement impracticable and justify replacement of the probable-cause standard with the regulation's "reasonable grounds" standard. It is reasonable to dispense with the warrant requirement here, since such a requirement would interfere to an appreciable degree with the probation system by setting up a magistrate rather than the probation officer as the determiner of how closely the probationer must be supervised, by making it more difficult for probation officials to respond quickly to evidence of misconduct, and by reducing the deterrent effect that the possibility of expeditious searches would otherwise create. Moreover, unlike the police officer who conducts the ordinary search, the probation officer is required to have the probationer's welfare particularly in mind. A probable-cause requirement would unduly disrupt the probation system by reducing the deterrent effect of the supervisory arrangement and by lessening the range of information the probation officer could consider in deciding whether to search. The probation agency must be able to act based upon a lesser degree of certainty in order to intervene before the probationer damages himself or society, and must be able to proceed on the basis of its entire experience with the probationer and to assess probabilities in the light of its knowledge of his life, character, and circumstances. Thus, it is reasonable to permit information provided by a police officer, whether or not on the basis of firsthand knowledge, to support a probationary search. All that is required is that the information provided indicates, as it did here, the likelihood of facts justifying the search. Pp. 875–880.

2. The conclusion that the regulation in question was constitutional makes it unnecessary to consider whether *any* search of a probationer's home is lawful when there are "reasonable grounds" to believe contraband is present. P. 880.

131 Wis. 2d 41, 388 N. W. 2d 535, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, in Parts I–B and I–C of which BRENNAN, J., joined, and in Part I–C of which STEVENS, J., joined, *post*, p. 881. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 890.

Alan G. Habermehl, by appointment of the Court, 479 U. S. 1053, argued the cause and filed briefs for petitioner.

Barry M. Levenson, Assistant Attorney General of Wisconsin, argued the cause for respondent. With him on the brief was *Donald J. Hanaway*, Attorney General.*

**Arthur Eisenberg* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

[Footnote is continued on p. 870]

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Joseph Griffin, who was on probation, had his home searched by probation officers acting without a warrant. The officers found a gun that later served as the basis of Griffin's conviction of a state-law weapons offense. We granted certiorari, 479 U. S. 1005 (1986), to consider whether this search violated the Fourth Amendment.

I

On September 4, 1980, Griffin, who had previously been convicted of a felony, was convicted in Wisconsin state court of resisting arrest, disorderly conduct, and obstructing an officer. He was placed on probation.

Wisconsin law puts probationers in the legal custody of the State Department of Health and Social Services and renders them "subject . . . to . . . conditions set by the court and rules and regulations established by the department." Wis. Stat. § 973.10(1) (1985–1986). One of the Department's regulations permits any probation officer to search a proba-

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Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson, Richard G. Taranto, and *Kathleen A. Felton* filed a brief for the United States as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of California by *John K. Van de Kamp*, Attorney General, *Steve White*, Chief Assistant Attorney General, and *Ronald E. Niver* and *Stan M. Helfman*, Deputy Attorneys General; and for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, *Lawrence S. Kahn*, Deputy Solicitor General, *Judith T. Kramer*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *John J. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *James T. Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Stephen E. Merrill*, Attorney General of New Hampshire, *E. Cary Edwards*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, and *T. Travis Medlock*, Attorney General of South Carolina.

tioner's home without a warrant as long as his supervisor approves and as long as there are "reasonable grounds" to believe the presence of contraband—including any item that the probationer cannot possess under the probation conditions. Wis. Admin. Code HSS §§ 328.21(4), 328.16(1) (1981).[1] The rule provides that an officer should consider a variety of factors in determining whether "reasonable grounds" exist, among which are information provided by an informant, the reliability and specificity of that information, the reliability of the informant (including whether the informant has any incentive to supply inaccurate information), the officer's own experience with the probationer, and the "need to verify compliance with rules of supervision and state and federal law." HSS § 328.21(7). Another regulation makes it a violation of the terms of probation to refuse to consent to a home search. HSS § 328.04(3)(k). And still another forbids a probationer to possess a firearm without advance approval from a probation officer. HSS § 328.04(3)(j).

On April 5, 1983, while Griffin was still on probation, Michael Lew, the supervisor of Griffin's probation officer, received information from a detective on the Beloit Police Department that there were or might be guns in Griffin's apartment. Unable to secure the assistance of Griffin's own probation officer, Lew, accompanied by another probation officer and three plainclothes policemen, went to the apartment. When Griffin answered the door, Lew told him who they were and informed him that they were going to search his home. During the subsequent search—carried out entirely by the probation officers under the authority of Wisconsin's probation regulation—they found a handgun.

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[1] HSS § 328 was promulgated in December 1981 and became effective on January 1, 1982. Effective May 1, 1986, HSS § 328.21 was repealed and repromulgated with somewhat different numbering and without relevant substantive changes. See 131 Wis. 2d 41, 60, n. 7, 388 N. W. 2d 535, 542, n. 7 (1986). This opinion will cite the old version of § 328.21, which was in effect at the time of the search.

Griffin was charged with possession of a firearm by a convicted felon, which is itself a felony. Wis. Stat. § 941.29(2) (1985–1986). He moved to suppress the evidence seized during the search. The trial court denied the motion, concluding that no warrant was necessary and that the search was reasonable. A jury convicted Griffin of the firearms violation, and he was sentenced to two years' imprisonment. The conviction was affirmed by the Wisconsin Court of Appeals, 126 Wis. 2d 183, 376 N. W. 2d 62 (1985).

On further appeal, the Wisconsin Supreme Court also affirmed. It found denial of the suppression motion proper because probation diminishes a probationer's reasonable expectation of privacy—so that a probation officer may, consistent with the Fourth Amendment, search a probationer's home without a warrant, and with only "reasonable grounds" (not probable cause) to believe that contraband is present. It held that the "reasonable grounds" standard of Wisconsin's search regulation satisfied this "reasonable grounds" standard of the Federal Constitution, and that the detective's tip established "reasonable grounds" within the meaning of the regulation, since it came from someone who had no reason to supply inaccurate information, specifically identified Griffin, and suggested a need to verify Griffin's compliance with state law. 131 Wis. 2d 41, 52–64, 388 N. W. 2d 535, 539–544 (1986).

II

We think the Wisconsin Supreme Court correctly concluded that this warrantless search did not violate the Fourth Amendment. To reach that result, however, we find it unnecessary to embrace a new principle of law, as the Wisconsin court evidently did, that any search of a probationer's home by a probation officer satisfies the Fourth Amendment as long as the information possessed by the officer satisfies a federal "reasonable grounds" standard. As his sentence for the commission of a crime, Griffin was committed to the legal custody of the Wisconsin State Department of Health and

Social Services, and thereby made subject to that Department's rules and regulations. The search of Griffin's home satisfied the demands of the Fourth Amendment because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles.

A

A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be "reasonable." Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), see, *e. g., Payton* v. *New York*, 445 U. S. 573, 586 (1980), we have permitted exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 351 (1985) (BLACKMUN, J., concurring in judgment). Thus, we have held that government employers and supervisors may conduct warrantless, work-related searches of employees' desks and offices without probable cause, *O'Connor* v. *Ortega*, 480 U. S. 709 (1987), and that school officials may conduct warrantless searches of some student property, also without probable cause, *New Jersey* v. *T. L. O., supra*. We have also held, for similar reasons, that in certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet "reasonable legislative or administrative standards." *Camara* v. *Municipal Court*, 387 U. S. 523, 538 (1967). See *New York* v. *Burger*, 482 U. S. 691, 702–703 (1987); *Donovan* v. *Dewey*, 452 U. S. 594, 602 (1981); *United States* v. *Biswell*, 406 U. S. 311, 316 (1972).

A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements. Probation, like incarceration, is "a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." G. Killinger, H. Kerper, & P. Cromwell, Probation and Parole in the Criminal Justice System 14 (1976); see also 18 U. S. C. § 3651 (1982 ed. and Supp. III) (probation imposed instead of imprisonment); Wis. Stat. § 973.09 (1985–1986) (same).[2] Probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service. A number of different options lie between those extremes, including confinement in a medium- or minimum-security facility, work-release programs, "halfway houses," and probation—which can itself be more or less confining depending upon the number and severity of restrictions imposed. See, *e. g.*, 18 U. S. C. § 3563 (1982 ed., Supp. III) (effective Nov. 1, 1987) (probation conditions authorized in federal system include requiring probationers to avoid commission of other crimes; to pursue employment; to avoid certain occupations, places, and people; to spend evenings or weekends in prison; and to avoid narcotics or excessive use of alcohol). To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions." *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972).

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[2] We have recently held that prison regulations allegedly infringing constitutional rights are themselves constitutional as long as they are "'reasonably related to legitimate penological interests.'" *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 349 (1987) (quoting *Turner* v. *Safley*, 482 U. S. 78, 89 (1987)). We have no occasion in this case to decide whether, as a general matter, that test applies to probation regulations as well.

These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. See *State* v. *Tarrell*, 74 Wis. 2d 647, 652–653, 247 N. W. 2d 696, 700 (1976). These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism, see Petersilia, Probation and Felony Offenders, 49 Fed. Probation 9 (June 1985), and the importance of supervision has grown as probation has become an increasingly common sentence for those convicted of serious crimes, see *id.*, at 4. Supervision, then, is a "special need" of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large. That permissible degree is not unlimited, however, so we next turn to whether it has been exceeded here.

B

In determining whether the "special needs" of its probation system justify Wisconsin's search regulation, we must take that regulation as it has been interpreted by state corrections officials and state courts. As already noted, the Wisconsin Supreme Court—the ultimate authority on issues of Wisconsin law—has held that a tip from a police detective that Griffin "had" or "may have had" an illegal weapon at his home constituted the requisite "reasonable grounds." See 131 Wis. 2d, at 64, 388 N. W. 2d, at 544. Whether or not we would choose to interpret a similarly worded federal regulation in that fashion, we are bound by the state court's interpretation, which is relevant to our constitutional analysis only insofar as it fixes the meaning of the regulation.[3] We think it clear that the special needs of Wisconsin's probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by "reasonable grounds," as defined by the Wisconsin Supreme Court.

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[3] If the regulation in question established a standard of conduct to which the probationer had to conform on pain of penalty—*e. g.*, a restriction on his movements—the state court could not constitutionally adopt so unnatural an interpretation of the language that the regulation would fail to provide adequate notice. Cf. *Kolender* v. *Lawson*, 461 U. S. 352, 357–358 (1983); *Lambert* v. *California*, 355 U. S. 225, 228 (1957). That is not an

A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, see *New Jersey* v. *T. L. O.*, 469 U. S., at 340, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create, see *New York* v. *Burger*, 482 U. S., at 710; *United States* v. *Biswell*, 406 U. S., at 316. By way of analogy, one might contemplate how parental custodial authority would be impaired by requiring judicial approval for search of a minor child's room. And on the other side of the equation—the effect of dispensing with a warrant upon the probationer: Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen. He is an employee of the State Department of Health and Social Services who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer (who in the regulations is called a "client," HSS § 328.03(5)). The applicable regulations require him, for example, to "[p]rovid[e] individualized counseling designed to foster growth and development of the client as necessary," HSS § 328.04(2)(i), and "[m]onito[r] the

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issue here since, even though the petitioner would be in violation of his probation conditions (and subject to the penalties that entails) if he failed to consent to any search that the regulation authorized, see HSS § 328.04(3)(k), nothing in the regulation or elsewhere required him to be advised, at the time of the request for search, what the probation officer's "reasonable grounds" were, any more than the ordinary citizen has to be notified of the grounds for "probable cause" or "exigent circumstances" searches before they may be undertaken.

client's progress where services are provided by another agency and evaluat[e] the need for continuation of the services," HSS § 328.04(2)(o). In such a setting, we think it reasonable to dispense with the warrant requirement.

JUSTICE BLACKMUN's dissent would retain a judicial warrant requirement, though agreeing with our subsequent conclusion that reasonableness of the search does not require probable cause. This, however, is a combination that neither the text of the Constitution nor any of our prior decisions permits. While it is possible to say that Fourth Amendment reasonableness demands probable cause without a judicial warrant, the reverse runs up against the constitutional provision that "no Warrants shall issue, but upon probable cause." Amdt. 4. The Constitution prescribes, in other words, that where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause. Although we have arguably come to permit an exception to that prescription for administrative search warrants,[4] which may but do not necessarily have to be issued by courts,[5] we have never done so for constitutionally mandated judicial warrants. There it remains true that "[i]f a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue." *Frank* v. *Maryland*, 359 U. S. 360, 373 (1959). JUSTICE BLACKMUN neither gives a justification for departure from that principle nor considers its implications for the body of Fourth Amendment law.

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[4] In the administrative search context, we formally require that administrative warrants be supported by "probable cause," because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness. See, *e. g.*, *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 320 (1978); *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967). In other contexts, however, we use "probable cause" to refer to a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as "reasonable suspicion." See *O'Connor* v. *Ortega*, 480 U. S. 709, 724 (1987) (plurality); *New Jersey* v. *T. L. O.*, 469 U. S. 325, 341–342 (1985). It is plainly in this sense that the dissent uses the term. See, *e. g.*, *post*, at 881–883 (less than probable cause means "a reduced level of suspicion").

[5] See *Marshall* v. *Barlow's, Inc.*, *supra*, at 307 ("We hold that . . . the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent"). The "neutral magistrate," *Camara*, *supra*, at 532, or "neutral officer," *Marshall* v. *Barlow's, Inc.*, *supra*, at 323, envisioned by our administrative search cases is not necessarily the "neutral judge," *post*, at 887, envisioned by the dissent.

We think that the probation regime would also be unduly disrupted by a requirement of probable cause. To take the facts of the present case, it is most unlikely that the unauthenticated tip of a police officer—bearing, as far as the record shows, no indication whether its basis was firsthand knowledge or, if not, whether the firsthand source was reliable, and merely stating that Griffin "had or might have" guns in his residence, not that he certainly had them—would meet the ordinary requirement of probable cause. But this is different from the ordinary case in two related respects: First, even more than the requirement of a warrant, a probable-cause requirement would reduce the deterrent effect of the supervisory arrangement. The probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected. The second difference is well reflected in the regulation specifying what is to be considered "[i]n deciding whether there are reasonable grounds to believe . . . a client's living quarters or property contain contraband," HSS § 328.21(7). The factors include not only the usual elements that a police officer or magistrate would consider, such as the detail and consistency of the information suggesting the presence of contraband and the reliability and motivation to dissemble of the informant, HSS §§ 328.21(7)(c), (d), but also "[i]nformation provided by the client which is relevant to whether the client possesses contraband," and "[t]he experience of a staff member with that client or in a similar circumstance." HSS §§328.21(7)(f), (g). As was true, then, in *O'Connor* v. *Ortega*, 480 U. S. 709 (1987), and *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985), we deal with a situation in which there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker.[6]

In such circumstances it is both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability of particular items of supporting data, and upon the same degree of certainty of violation, as is required in other contexts. In some cases—especially those involving drugs or illegal weapons—the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society. The agency, moreover, must be able to proceed on the basis of its entire experience with the probationer, and to assess probabilities in the light of its knowledge of his life, character, and circumstances.

To allow adequate play for such factors, we think it reasonable to permit information provided by a police officer,[7] whether or not on the basis of firsthand knowledge, to support a probationer search. The same conclusion is suggested by the fact that the police may be unwilling to disclose their confidential sources to probation personnel. For the same reason, and also because it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law, we think it enough if the information provided indicates, as it did here, only the likelihood ("had or might have guns") of facts justifying the search.[8]

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[6] It is irrelevant whether the probation authorities relied upon any peculiar knowledge which they possessed of petitioner in deciding to conduct the present search. Our discussion pertains to the reasons generally supporting the proposition that the search decision should be left to the expertise of probation authorities rather than a magistrate, and should be supportable by a lesser quantum of concrete evidence justifying suspicion than would be required to establish probable cause. That those reasons may not obtain in a particular case is of no consequence. We may note, nonetheless, that the dissenters are in error to assert as a fact that the probation authorities made no use of special knowledge in the present case, *post*, at 890. All we know for certain is that the petitioner's probation officer could not be reached; whether any material contained in petitioner's probation file was used does not appear.

[7] The dissenters speculate that the information might not have come from the police at all, "but from someone impersonating an officer." *Post*,

The search of Griffin's residence was "reasonable" within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers. This conclusion makes it unnecessary to consider whether, as the court below held and the State urges, *any* search of a probationer's home by a probation officer is lawful when there are "reasonable grounds" to believe contraband is present. For the foregoing reasons, the judgment of the Wisconsin Supreme Court is

Affirmed.

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at 888. The trial court, however, found as a matter of fact that Lew received the tip on which he relied from a police officer. See 131 Wis. 2d, at 62, 388 N. W. 2d, at 543. The Wisconsin Supreme Court affirmed that finding, *ibid.*, and neither the petitioner nor the dissenters assert that it is clearly erroneous.

[8] The dissenters assert that the search did not comport with all the governing Wisconsin regulations. There are reasonable grounds on which the Wisconsin court could find that it did. But we need not belabor those here, since the only regulation upon which we rely for our constitutional decision is that which permits a warrantless search on "reasonable grounds." The Wisconsin Supreme Court found the requirement of "reasonable grounds" to have been met on the facts of this case and, as discussed earlier, we hold that such a requirement, so interpreted, meets constitutional minimum standards as well. That the procedures followed, although establishing "reasonable grounds" under Wisconsin law, and adequate under federal constitutional standards, may have violated Wisconsin state regulations, is irrelevant to the case before us.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins and, as to Parts I-B and I-C, JUSTICE BRENNAN joins and, as to Part I-C, JUSTICE STEVENS joins, dissenting.

In ruling that the home of a probationer may be searched by a probation officer without a warrant, the Court today takes another step that diminishes the protection given by the Fourth Amendment to the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In my view, petitioner's probationary status provides no reason to abandon the warrant requirement. The probation system's special law enforcement needs may justify a search by a probation officer on the basis of "reasonable suspicion," but even that standard was not met in this case.

I

The need for supervision in probation presents one of the "exceptional circumstances in which special needs, beyond the normal need for law enforcement," *New Jersey* v. *T. L. O.*, 469 U. S. 325, 351 (1985) (opinion concurring in judgment), justify an application of the Court's balancing test and an examination of the practicality of the warrant and probable-cause requirements. The Court, however, fails to recognize that this is a *threshold* determination of special law enforcement needs. The warrant and probable-cause requirements provide the normal standard for "reasonable" searches. "[O]nly when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a 'balancing' test to formulate a standard of reasonableness for this context." *O'Connor* v. *Ortega*, 480 U. S. 709, 741 (1987) (dissenting opinion). The presence of special law enforcement needs justifies resort to the balancing test, but it does not preordain the necessity of recognizing exceptions to the warrant and probable-cause requirements.

My application of the balancing test leads me to conclude that special law enforcement needs justify a search by a probation agent of the home of a probationer on the basis of a reduced level of suspicion. The acknowledged need for supervision, however, does not also justify an exception to the warrant requirement, and I would retain this means of protecting a probationer's privacy.[1] Moreover, the necessity for the neutral check provided by the warrant requirement is demonstrated by this case, in which the search was conducted on the basis of information that did not begin to approach the level of "reasonable grounds."

A

The probation officer is not dealing with an average citizen, but with a person who has been convicted of a crime.[2] This presence of an offender in the community creates the need for special supervision. I therefore agree that a probation agent must have latitude in observing a probationer if the agent is to carry out his supervisory responsibilities effectively. Recidivism among probationers is a major problem, and supervision is one means of combating that threat. See *ante*, at 875. Supervision also provides a crucial means of advancing rehabilitation by allowing a probation agent to intervene at the first sign of trouble.

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[1] There is no need to deny the protection provided by the warrant requirement simply because a search can be justified by less than probable cause. The Court recognizes that administrative warrants are issued on less than probable cause, but it concludes that this has never been the case for "judicial warrants." *Ante*, at 877–878. This conclusion overlooks the fact that administrative warrants *are* issued by the judiciary. See, *e. g.*, *Camara* v. *Municipal Court*, 387 U. S. 523, 532 (1967) ("These are questions which may be reviewed by a neutral magistrate"); *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 316 (1978) (warrant requirement for inspection will not "impose serious burdens on . . . the courts"); *id.*, at 323 (warrant "would provide assurances from a neutral officer that the inspection is reasonable under the Constitution").

[2] I find curious, however, the Court's reference to the constitutional standard of review for prison regulations, which neither party argued was applicable to this case. There is plainly no justification for importing automatically into the probation context these special constitutional standards, which are necessitated by the "essential goals" of "maintaining institutional security and preserving internal order and discipline" inside the walls of a prison. *Bell* v. *Wolfish*, 441 U. S. 520, 546 (1979). A probationer is not in confinement.

One important aspect of supervision is the monitoring of a probationer's compliance with the conditions of his probation. In order to ensure compliance with those conditions, a probation agent may need to search a probationer's home to check for violations. While extensive inquiry may be required to gather the information necessary to establish probable cause that a violation has occurred, a "reasonable grounds" standard allows a probation agent to avoid this delay and to intervene at an earlier stage of suspicion. This standard is thus consistent with the level of supervision necessary to protect the public and to aid rehabilitation. At the same time, if properly applied, the standard of reasonable suspicion will protect a probationer from unwarranted intrusions into his privacy.

B

I do not think, however, that special law enforcement needs justify a modification of the protection afforded a probationer's privacy by the warrant requirement. The search in this case was conducted in petitioner's *home*, the place that traditionally has been regarded as the center of a person's private life, the bastion in which one has a legitimate expectation of privacy protected by the Fourth Amendment. See *Silverman* v. *United States*, 365 U. S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"). The Court consistently has held that warrantless searches and seizures in a home violate the Fourth Amendment absent consent or exigent circumstances. See, *e. g., United States* v. *Karo*, 468 U. S. 705, 714–715 (1984); *Steagald* v. *United States*, 451 U. S. 204 (1981) (arrest warrant inadequate for search of home of a third party); *Payton* v. *New York*, 445 U. S. 573 (1980) (warrantless arrest of suspect in his home unconstitutional).

> "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972). And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. It is not surprising, therefore, that the Court has recognized, as 'a "basic principle of Fourth Amendment law[,]" that searches and seizures inside a home without a warrant are presumptively unreasonable.' *Payton* v. *New York*, 445 U. S., at 586." *Welsh* v. *Wisconsin*, 466 U. S. 740, 748–749 (1984) (footnote and citation omitted).

The administrative-inspection cases are inapposite to a search of a home. Each of the cases that this Court has found to fall within the exception to the administrative-warrant requirement has concerned the lesser expectation of privacy attached to a "closely regulated" business. See, *e. g.*, *New York* v. *Burger*, 482 U. S. 691 (1987) (vehicle dismantlers); *Donovan* v. *Dewey*, 452 U. S. 594 (1981) (mines); *United States* v. *Biswell*, 406 U. S. 311 (1972) (gun dealers). The reasoning that may justify an administrative inspection without a warrant in the case of a business enterprise simply does not extend to the invasion of the special privacy the Court has recognized for the home.

A probationer usually lives at home, and often, as in this case, with a family. He retains a legitimate privacy interest in the home that must be respected to the degree that it is not incompatible with substantial governmental needs. The Court in *New Jersey* v. *T. L. O.* acknowledged that the Fourth Amendment issue needs to be resolved in such a way as to "ensure that the [privacy] interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." 469 U. S., at 343. The privacy interests of probationers should be protected by a similar standard, and invaded no more than is necessary to satisfy probation's dual goals of protecting the public safety and encouraging the rehabilitation of the probationer.

The search in this case was not the result of an ordinary home visit by petitioner's probation agent for which no warrant is required. Cf. *Wyman* v. *James*, 400 U. S. 309 (1971). It was a search pursuant to a tip, ostensibly from the police, for the purpose of uncovering evidence of a criminal violation. There is nothing about the *status* of probation that justifies a special exception to the warrant requirement under these circumstances. If in a particular case there is a compelling need to search the home of a probationer without delay, then it is possible for a search to be conducted immediately under the established exception for exigent circumstances. There is no need to create a separate warrant exception for probationers. The existing exception provides a probation agent with all the flexibility the agent needs.

The circumstances of this case illustrate the fact that the warrant requirement does not create any special impediment to the achievement of the goals of probation. The probation supervisor, Michael T. Lew, waited "[t]wo or three hours" after receiving the telephone tip before he proceeded to petitioner's home to conduct the search. App. 16. He testified that he was waiting for the return of petitioner's official agent who was attending a legal proceeding, and that eventually he requested another probation agent to initiate the search. *Id.*, at 16, 51. Mr. Lew thus had plenty of time to obtain a search warrant. If the police themselves had investigated the report of a gun at petitioner's residence, they would have been required to obtain a warrant. There simply was no compelling reason to abandon the safeguards provided by neutral review.

The Court appears to hold the curious assumption that the probationer will *benefit* by dispensing with the warrant requirement. It notes that a probation officer does not normally conduct searches, as does a police officer, and, moreover, the officer is "supposed to have in mind the welfare of the probationer." *Ante*, at 876. The implication is that a probation agent will be less likely to initiate an inappropriate search than a law-enforcement officer, and is thus less in need of neutral review. Even if there were data to support this notion, a *reduced* need for review does not justify a complete removal of the warrant requirement. Furthermore, the benefit that a probationer is supposed to gain from probation is rehabilitation. I fail to see how the role of the probation agent in "'foster[ing] growth and development of the client,'" *ibid.*, quoting Wis. Admin. Code HSS § 328.04 (2)(i) (1981), is enhanced the slightest bit by the ability to conduct a search without the checks provided by prior neutral review. If anything, the power to decide to search will prove a barrier to establishing any degree of trust between agent and "client."

The Court also justifies the exception to the warrant requirement that it would find in the Wisconsin regulations by stressing the need to have a probation agent, rather than a judge, decide how closely supervised a particular probationer should be. See *ante*, at 876. This argument mistakes the nature of the search at issue. The probation agent retains discretion over the terms of a probationer's supervision—the warrant requirement introduces a judge or a magistrate into the decision only when a full-blown search for evidence of a criminal violation is at stake. The Court's justification for the conclusion that the warrant requirement would interfere with the probation system by way of an analogy to the authority possessed by parents over their children is completely unfounded. The difference between the two situations is too obvious to belabor. Unlike the private nature of a parent's interaction with his or her child, the probation system is a governmental operation, with explicit standards. Experience has shown that a neutral judge can best determine if those standards are met and a search is justified. This case provides an excellent illustration of the need for neutral review of a probation officer's decision to conduct a search, for it is obvious that the search was not justified even by a reduced standard of reasonable suspicion.

C

The Court concludes that the search of petitioner's home satisfied the requirements of the Fourth Amendment "because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles." *Ante*, at 873. In the Court's view, it seems that only the single regulation requiring "reasonable grounds" for a search is relevant to its decision. *Ante*, at 880, n. 8. When faced with the patent failure of the probation agents to comply with the Wisconsin regulations, the Court concludes that it "is irrelevant to the case before us" that the probation agents "may have violated Wisconsin state regulations." *Ibid.* All of these other regulations, which happen to define the steps necessary to ensure that reasonable grounds are present, can be ignored. This conclusion that the existence of a facial requirement for "reasonable grounds" automatically satisfies the constitutional protection that a search be reasonable can only be termed tautological. The content of a standard is found in its application and, in this case, I cannot discern the application of any standard whatsoever.

The suspicion in this case was based on an unverified tip from an unknown source. With or without the Wisconsin regulation, such information cannot constitutionally justify a search. Mr. Lew testified that he could not recall which police officer called him with the information about the gun, although he thought it "probably" was Officer Pittner. App. 16. Officer Pittner, however, did not remember making any such telephone call. *Id.*, at 39. From all that the record reveals, the call could have been placed by anyone. It is even plausible that the information did not come from the police at all, but from someone impersonating an officer.

Even assuming that a police officer spoke to Mr. Lew, there was little to demonstrate the reliability of the information he received from that unknown officer. The record does not reveal even the precise content of the tip. The unknown officer actually may have reported that petitioner "had" contraband in his possession, *id.*, at 51, or he merely may have suggested that petitioner "may have had guns in his apartment." *Id.*, at 14. Mr. Lew testified to both at different stages of the proceedings. Nor do we know anything about the ultimate source of the information. The unknown officer's belief may have been founded on a hunch, a rumor, or an informant's tip. Without knowing more about the basis of the tip, it is impossible to form a conclusion, let alone a reasonable conclusion, that there were "reasonable grounds" to justify a search.

Mr. Lew failed completely to make the most rudimentary effort to confirm the information he had received or to evaluate whether reasonable suspicion justified a search. Conspicuously absent was any attempt to comply with the Wisconsin regulations that governed the content of the "reasonable grounds" standard. Wis. Admin. Code HSS § 328.21(7) (1981).[3] No observations of a staff member could

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[3] The version of the regulations cited by the Court provided:

"(7) In deciding whether there are reasonable grounds to believe a client possesses contraband, or a client's living quarters or property contain contraband, a staff member should consider:

"(a) The observations of a staff member;

"(b) Information provided by an informant;

"(c) The reliability of the information relied on; in evaluating reliability, attention should be given to whether the information is detailed and consistent and whether it is corroborated;

"(d) The reliability of an informant; in evaluating reliability, attention should be given to whether the informant has supplied reliable information have been considered, as required by subsection (7)(a), for Mr. Lew did not consult the agent who had personal knowledge of petitioner's case. When information was provided by an informant, subsections (7)(c) and (d) required evaluation of the reliability of the information relied upon and the reliability of the informant. Mr. Lew proceeded in violation of these basic requirements. Subsection (7)(f) referred to "information provided by the client" and the explanatory notes stated that "the client should be talked to before the search. Sometimes, this will elicit information helpful in determining whether a search should be made." § 328.21 App., p. 250. This requirement, too, was ignored. Nor do any of the other considerations support a finding of reasonable grounds to conduct the search. There is no indication that there had been prior seizures of contraband from petitioner, or that his case presented any special need to verify compliance with the law. See §§ 328.21(7)(h) and (i).

The majority acknowledges that it is "most unlikely" that the suspicion in this case would have met the normal "probable cause" standard. *Ante*, at 878. It concludes, however, that this is not an "ordinary" case because of the need for supervision and the continuing relationship between the probationer and the probation agency. *Ibid.* In view of this con-

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in the past, and whether the informant has reason to supply inaccurate information;

"(e) The activity of the client that relates to whether the client might possess contraband;

"(f) Information provided by the client which is relevant to whether the client possesses contraband;

"(g) The experience of a staff member with that client or in a similar circumstance;

"(h) Prior seizures of contraband from the client; and

"(i) The need to verify compliance with rules of supervision and state and federal law." Wis. Admin. Code HSS § 328.21(7) (1981).

The regulations governing the administration of Wisconsin's probation system have been amended recently. See *ante*, at 871, n. 1. Under the new rule the word "should" has been changed to "shall" throughout this subsection. See Wis. Admin. Code HSS § 328.21(6) (1986).

tinuing relationship, the regulations mandated consideration of factors that go beyond those normally considered in determining probable cause to include information provided by the probationer and the experience of the staff member with the probationer. But unless the agency adheres to the regulations, it is sophistic to rely on them as a justification for conducting a search on a lesser degree of suspicion. Mr. Lew drew on no special knowledge of petitioner in deciding to search his house. He had no contact with the agent familiar with petitioner's case before commencing the search. Nor, as discussed above, was there the slightest attempt to obtain information from petitioner. In this case, the continuing relationship between petitioner and the agency did not supply support for any suspicion, reasonable or otherwise, that would justify a search of petitioner's home.

II

There are many probationers in this country, and they have committed crimes that range widely in seriousness. The Court has determined that all of them may be subjected to such searches in the absence of a warrant. Moreover, in authorizing these searches on the basis of a reduced level of suspicion, the Court overlooks the feeble justification for the search in this case.

I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Mere speculation by a police officer that a probationer "may have had" contraband in his possession is not a constitutionally sufficient basis for a warrantless, nonconsensual search of a private home. I simply do not understand how five Members of this Court can reach a contrary conclusion. Accordingly, I respectfully dissent.

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 890 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 22 THROUGH OCTOBER 2, 1987

JUNE 22, 1987

Dismissal Under Rule 53

No. 86–1843. LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. *v.* RIOS. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 812 F. 2d 1032.

Appeals Dismissed

No. 86–1528. HARSH INVESTMENT CORP. *v.* CITY AND COUNTY OF DENVER ET AL. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. JUSTICE WHITE took no part in the consideration or decision of this case. Reported below: 728 P. 2d 1281.

No. 86–1727. CONNOR *v.* SACHS ET AL. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction.

No. 86–1736. DREWS, BY HIS GUARDIAN, DREWS *v.* DREWS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 115 Ill. 2d 201, 503 N. E. 2d 339.

No. 86–5678. HILL *v.* CITY OF HOUSTON, TEXAS. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 789 F. 2d 1103.

No. 86–6816. MOORE *v.* AMERICAN SAVINGS & LOAN ASSN. ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 800 F. 2d 1145.

No. 86–6844. FOREMAN *v.* MERIT SYSTEMS PROTECTION BOARD. Appeal from C. A. Fed. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 818 F. 2d 875.

No. 86–1823. WADDELL *v.* MICHIGAN. Appeal from Ct. App. Mich. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 85–98. ANSCHUETZ & CO., GMBH. *v.* MISSISSIPPI RIVER BRIDGE AUTHORITY ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U. S. 522 (1987). Reported below: 754 F. 2d 602.

No. 85–99. MESSERSCHMITT BOLKOW BLOHM, GMBH. *v.* WALKER ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U. S. 522 (1987). Reported below: 757 F. 2d 729.

No. 86–1738. LACINA ET AL. *v.* G–K TRUCKING ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *West* v. *Conrail*, 481 U. S. 35 (1987). JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 802 F. 2d 1190.

Miscellaneous Orders

No. D–622. IN RE DISBARMENT OF PASTERNAK. Disbarment entered. [For earlier order herein, see 480 U. S. 944.]

No. D–643. IN RE DISBARMENT OF ROSENBLEET. It is ordered that Charles Rosenbleet, of Bethesda, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. It is ordered that Owen Olpin, Esquire, of Los Angeles, Cal., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

Motions of Basin Electric Power Cooperative, Platte River Trust, National Audubon Society, and Nebraska Public Power District et al. for leave to intervene referred to the Special Master. [For earlier order herein, see, *e. g.*, 481 U. S. 1011.]

No. 86–622. TRAYNOR *v.* TURNAGE, ADMINISTRATOR, VETERANS' ADMINISTRATION, ET AL. C. A. 2d Cir. [Certiorari granted, 480 U. S. 916]; and

No. 86–737. MCKELVEY *v.* TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. C. A. D. C. Cir. [Certiorari granted, 480 U. S. 916.] Motion of petitioners for divided argument denied. JUSTICE SCALIA took no part in the consideration or decision of this motion.

No. 86–939. ETSI PIPELINE PROJECT *v.* MISSOURI ET AL.; and

No. 86–941. HODEL, SECRETARY OF THE INTERIOR, ET AL. *v.* MISSOURI ET AL. C. A. 8th Cir. [Certiorari granted, 480 U. S. 905.] Motion of the Solicitor General for divided argument denied. Motion of respondents for divided argument denied. Motion of Montana et al. for leave to participate in oral argument as *amici curiae*, for additional time for oral argument, and for divided argument denied.

No. 86–1329 (A–894). GULFSTREAM AEROSPACE CORP. *v.* MAYACAMAS CORP. C. A. 9th Cir. [Certiorari granted, 481 U. S. 1068.] Motion of petitioner to expedite oral argument denied. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. 86–1659. CONTINENTAL CAN CO. *v.* GAVALIK ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 86–6835. WRENN *v.* CAPSTONE MEDICAL CENTER ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 13, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86-6767. IN RE CALDWELL. Petition for writ of mandamus denied.

No. 86-6783. IN RE PHILLIPS. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 86-935. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* PUBLIC EMPLOYMENT RELATIONS BOARD ET AL. Appeal from Ct. App. Cal., 1st App. Dist. Probable jurisdiction noted. Reported below: 182 Cal. App. 3d 71, 227 Cal. Rptr. 57.

No. 86-1172. GOODYEAR ATOMIC CORP. *v.* MILLER ET AL. Appeal from Sup. Ct. Ohio. Probable jurisdiction noted. Reported below: 26 Ohio St. 3d 110, 497 N. E. 2d 76.

Certiorari Granted

No. 86-1387. MACKEY ET AL. *v.* LANIER COLLECTION AGENCY & SERVICE, INC. Sup. Ct. Ga. Certiorari granted. Reported below: 256 Ga. 499, 350 S. E. 2d 439.

No. 86-1431. LOEFFLER *v.* TISCH, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 8th Cir. Certiorari granted. Reported below: 806 F. 2d 817.

No. 86-958. NORWEST BANK WORTHINGTON ET AL. *v.* AHLERS ET UX. C. A. 8th Cir. Motion of American Bankers Association for leave to file a brief as *amicus curiae* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 794 F. 2d 388.

No. 86-6139. WATSON *v.* FORT WORTH BANK & TRUST. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 798 F. 2d 791.

No. 86-6867. LOWENFIELD *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 817 F. 2d 285.

Certiorari Denied. (See also Nos. 86-1736, 86-5678, 86-6816, and 86-6844, *supra.*)

No. 86-1400. COMMONWEALTH OIL REFINING CO., INC. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 5th Cir. Certiorari denied. Reported below: 805 F. 2d 1175.

No. 86-1416. MOTTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 808 F. 2d 1518.

No. 86-1417. COLLINS ET AL. *v.* COUNTY OF KENDALL, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 807 F. 2d 95.

No. 86-1429. SECURITIES INDUSTRY ASSN. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 257 U. S. App. D. C. 137, 807 F. 2d 1052.

No. 86-1436. YANKTON SIOUX TRIBE OF INDIANS *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 796 F. 2d 241.

No. 86-1474. RUBIN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 490 So. 2d 1001.

No. 86-1480. ALEXANDER ET AL. *v.* CHEVRON U. S. A. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 526.

No. 86-1493. STATE BANK OF INDIA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 808 F. 2d 526.

No. 86-1514. CALLAHAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 808 F. 2d 837.

No. 86-1527. MCCLELLAN REALTY CO. ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 803 F. 2d 1288.

No. 86–1543. PETERSON PAINTING, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 1253.

No. 86–1553. COHEN *v.* UNITED STATES; and

No. 86–1579. IANNIELLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 808 F. 2d 184.

No. 86–1577. FERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 797 F. 2d 943.

No. 86–1589. PRICE *v.* TAMPA ELECTRIC CO. C. A. 11th Cir. Certiorari denied. Reported below: 806 F. 2d 1551.

No. 86–1594. SMALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 F. 2d 1418.

No. 86–1689. KIN SUN YUEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 1522.

No. 86–1721. NEW JERSEY TRANSIT POLICEMEN'S BENEVOLENT ASSN., LOCAL 304 *v.* NEW JERSEY TRANSIT CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 806 F. 2d 451.

No. 86–1724. O'MALLEY *v.* XEROX CORP. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1731. BEHRMAN *v.* BEHRMAN. App. Ct. Mass. Certiorari denied. Reported below: 23 Mass. App. 1104, 500 N. E. 2d 292.

No. 86–1745. MOORE ET AL. *v.* FROST ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 809 F. 2d 297.

No. 86–1749. BENZIES *v.* ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES. C. A. 7th Cir. Certiorari denied. Reported below: 810 F. 2d 146.

No. 86–1752. ILLINOIS *v.* GIBONS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 149 Ill. App. 3d 37, 500 N. E. 2d 517.

No. 86–1755. WMBIC INDEMNITY CORP. *v.* SUPERIOR COURT OF LOS ANGELES COUNTY (SHORT, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1759. WOOD ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF

AMERICA, LOCAL 406, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 807 F. 2d 493.

No. 86-1763. WALKER *v.* THIELEN MOTORS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 81.

No. 86-1768. TOBIN *v.* PETRILLO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 148 Ill. App. 3d 581, 499 N. E. 2d 952.

No. 86-1769. CITY OF LAWTON, OKLAHOMA *v.* TURNER. Sup. Ct. Okla. Certiorari denied. Reported below: 733 P. 2d 375.

No. 86-1770. OKLAHOMA CORPORATION COMMISSION *v.* HARRY R. CARLILE TRUST (ARTHURS, TRUSTEE). Sup. Ct. Okla. Certiorari denied. Reported below: 732 P. 2d 438.

No. 86-1777. SZOPKO *v.* KINSMAN MARINE TRANSIT CO. Sup. Ct. Mich. Certiorari denied. Reported below: 426 Mich. 653, 397 N. W. 2d 171.

No. 86-1809. PEREGOFF *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 68 Md. App. 736.

No. 86-1819. BORELLI *v.* UNITED STATES;
No. 86-1820. USTICA *v.* UNITED STATES;
No. 86-1821. RENDINI *v.* UNITED STATES; and
No. 86-6810. TUREKIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 811 F. 2d 47.

No. 86-1835. ROCHMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 67.

No. 86-1844. CAVANAUGH ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 815 F. 2d 691.

No. 86-5590. DETTMER *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS C. A. 4th Cir. Certiorari denied. Reported below: 799 F. 2d 929.

No. 86-6447. PLAISANCE *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied.

No. 86-6500. DAVIS *v.* UNITED STATES;
No. 86-6522. RANSOM *v.* UNITED STATES;

No. 86-6530. DAVIS *v.* UNITED STATES; and
No. 86-6792. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 809 F. 2d 1194.

No. 86-6505. REDFERN *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 86-6524. CRUTCHFIELD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 803 F. 2d 1103.

No. 86-6565. FELTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 811 F. 2d 190.

No. 86-6587. TOSCH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 114 Ill. 2d 474, 501 N. E. 2d 1253.

No. 86-6598. LANGFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 802 F. 2d 1176.

No. 86-6631. THIBODEAUX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 811 F. 2d 847.

No. 86-6633. TOWLES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 521 A. 2d 651.

No. 86-6788. MACK *v.* CHICAGO ALLIED WAREHOUSES, INC., ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 145 Ill. App. 3d 1159, 511 N. E. 2d 277.

No. 86-6797. BAKER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 86-6798. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 811 F. 2d 1505.

No. 86-6802. LINDER *v.* LINDER. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 86-6803. FAHEY *v.* JAMES E. BECKLEY & ASSOCIATES. C. A. 7th Cir. Certiorari denied. Reported below: 815 F. 2d 708.

No. 86-6805. SIMPSON *v.* BOWERS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 711.

No. 86-6806. FRANSAW *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 518.

No. 86-6807. GROFF *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 515 Pa. 580, 527 A. 2d 541.

No. 86-6815. MOORE *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-6829. HAIRSTON *v.* TINGEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 672.

No. 86-6830. CAMPBELL *v.* MONTANA. Sup. Ct. Mont. Certiorari denied.

No. 86-6831. BURKS *v.* HOLIDAY CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 76.

No. 86-6852. VILLANUEVA *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 1403.

No. 86-6861. AKUDIGWE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 814 F. 2d 655.

No. 86-6869. DIGREGORIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 694.

No. 86-6870. GORDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 965.

No. 86-6874. HALBLEIB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 696.

No. 86-6877. LONDON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 696.

No. 86-6888. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 408.

No. 86-6892. VANOVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 81.

No. 86-6916. MAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 398.

No. 86-6917. SCUTARI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1231.

No. 86-1115. LOUISIANA LAND & EXPLORATION CO. *v.* TEXACO INC. Sup. Ct. La. Motions of Louisiana Landowners

Association, Inc., and National Association of Royalty Owners, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 491 So. 2d 363.

No. 86-1572. KEMP, WARDEN *v.* BROOKS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 809 F. 2d 700.

No. 86-1765. FAIRMAN, WARDEN *v.* ESPINOZA. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 813 F. 2d 117.

No. 86-1575. DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI *v.* CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 809 F. 2d 266.

No. 86-1599. SANCHEZ *v.* ILLINOIS. Sup. Ct. Ill.;
No. 86-1754. EVANS *v.* BAIR, WARDEN. Cir. Ct. Alexandria, Va.;
No. 86-6436. DEHART *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 86-6491. JACKSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 86-6654. GUEST *v.* ILLINOIS. Sup. Ct. Ill.;
No. 86-6823. JACKSON *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 86-6944. BANNISTER *v.* MISSOURI. Ct. App. Mo., Southern Dist.; and
No. 86-6984. RITTER *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: No. 86-1599, 115 Ill. 2d 238, 503 N. E. 2d 277; No. 86-6436, 512 Pa. 235, 516 A. 2d 656; No. 86-6491, 498 So. 2d 406; No. 86-6654, 115 Ill. 2d 72, 503 N. E. 2d 255; No. 86-6823, 501 So. 2d 542; No. 86-6944, 726 S. W. 2d 821; No. 86-6984, 811 F. 2d 1398.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 86-1638. LEE ENTERPRISES, INC., ET AL. *v.* SIBLE. Sup. Ct. Mont. Motion of American Newspaper Publishers Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 224 Mont. 163, 729 P. 2d 1271.

No. 86-1686. FORD MOTOR CO. *v.* ANDERSEN ET AL. C. A. 8th Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition. Reported below: 803 F. 2d 953.

No. 86-1761. PRATT ET AL. *v.* SHOEMATE, SUPERINTENDENT OF THE OSAGE INDIAN AGENCY, ET AL. C. A. 10th Cir. Motion of petitioners to strike brief of federal respondents denied. Certiorari denied.

No. 86-1964 (A-896). WALLACE *v.* ARIZONA. Sup. Ct. Ariz. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 151 Ariz. 362, 728 P. 2d 232.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 86-6821. JROE *v.* CARHART ET AL. Sup. Jud. Ct. Mass. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied.

Rehearing Denied

No. 85-2169. SAINT FRANCIS COLLEGE ET AL. *v.* AL-KHAZRAJI, AKA ALLAN, 481 U. S. 604;

No. 86-1510. TYRAKOWSKI *v.* TYRAKOWSKI, 481 U. S. 1044;

No. 86-1597. CHETISTER *v.* DOUGLAS, JUSTICE, SUPREME COURT OF OHIO, ET AL., 481 U. S. 1069;

No. 86-5026. WINGO *v.* BLACKBURN, WARDEN, 481 U. S. 1042;

No. 86-5292. LOYD *v.* LOUISIANA, 481 U. S. 1042;

No. 86–5379. WATSON *v.* BLACKBURN, WARDEN, 481 U. S. 1042;

No. 86–5426. BROGDON *v.* BLACKBURN, WARDEN, 481 U. S. 1042;

No. 86–5436. GLASS *v.* BLACKBURN, WARDEN, 481 U. S. 1042;

No. 86–5544. WELCOME *v.* BLACKBURN, WARDEN, 481 U. S. 1042;

No. 86–5800. BERRY *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL., 481 U. S. 1042;

No. 86–6043. RAULT *v.* BLACKBURN, WARDEN, 481 U. S. 1042;

No. 86–6188. MOORE *v.* BLACKBURN, WARDEN, 481 U. S. 1042;

No. 86–6303. PIERRE, AKA SELBY *v.* SHULSEN, WARDEN, ET AL., 481 U. S. 1033;

No. 86–6322. ROSS *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL., 481 U. S. 1052;

No. 86–6364. STICKLES *v.* VETERANS ADMINISTRATION, 481 U. S. 1053;

No. 86–6397. LOPEZ *v.* UNITED STATES, 481 U. S. 1030;

No. 86–6473. RAMIREZ *v.* ILLINOIS, 481 U. S. 1053;

No. 86–6603. DOBBS *v.* KEMP, WARDEN, 481 U. S. 1059;

No. 86–6609. CARPENTER *v.* HEETER, JUDGE, MUNICIPAL COURT OF LIMA, OHIO, ET AL., 481 U. S. 1040; and

No. 86–6686. LOVINGOOD *v.* UNITED STATES, 481 U. S. 1057. Petitions for rehearing denied.

No. 85–5402. GRADY *v.* MISSOURI, 474 U. S. 951. Motion for leave to file petition for rehearing denied.

No. 86–1366. DUQUESNE LIGHT CO. ET AL. *v.* STATE TAX DEPARTMENT OF WEST VIRGINIA ET AL., 481 U. S. 1044. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 86–5769 (A–871). THOMPSON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 481 U. S. 1042. Application for stay of execution of sentence of death, addressed to JUSTICE STEVENS and referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application. Petition for rehearing denied.

JUNE 23, 1987

Miscellaneous Orders

No. A-936 (86-1970). MISSISSIPPI POWER & LIGHT CO. *v.* MISSISSIPPI EX REL. PITTMAN, ATTORNEY GENERAL, ET AL. Application for stay of the Order Granting Mandatory Temporary Restraining Order and Setting Aside Chancery Court Order of June 18, 1987, issued by the Supreme Court of Mississippi on June 19, 1987, presented to JUSTICE WHITE, and by him referred to the Court, is hereby granted pending further order of the Court.

No. A-944. JOHNSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

JUNE 26, 1987

Appeals Dismissed

No. 86-1722. HEUBLEIN, INC. *v.* GEORGIA ET AL. Appeal from Sup. Ct. Ga. dismissed for want of properly presented federal question. JUSTICE STEVENS and JUSTICE SCALIA would note probable jurisdiction and set case for oral argument. Reported below: 256 Ga. 578, 351 S. E. 2d 190.

No. 86-1787. L. L. BEAN, INC. *v.* DRAKE PUBLISHERS, INC., ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 811 F. 2d 26.

No. 86-1948. ANDERSON *v.* OREGON STATE BAR ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction.

Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–1828. ALBERTUS ET AL. *v.* STATE TAX COMMISSION OF MISSOURI ET AL. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 722 S. W. 2d 916.

Vacated and Remanded on Appeal

No. 86–358. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL. Appeal from Sup. Ct. Ark. Motion of Yellow Freight System et al. for leave to file a brief as *amici curiae* granted. Judgment vacated and case remanded for further consideration in light of *American Trucking Assns., Inc.* v. *Scheiner, ante,* p. 266. Reported below: 288 Ark. 488, 707 S. W. 2d 759.

No. 86–415. REIVITZ, SECRETARY, WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES *v.* LESKO ET AL.; and

No. 86–744. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* LESKO ET AL. Appeals from D. C. E. D. Wis. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment vacated and cases remanded for further consideration in light of *Bowen* v. *Gilliard, ante,* p. 587. Reported below: 639 F. Supp. 1152.

No. 86–1140. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* BALDWIN ET AL.; and

No. 86–1161. LEDBETTER, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES *v.* BALDWIN. Appeals from D. C. N. D. Ga. Judgment vacated and cases remanded for further consideration in light of *Bowen* v. *Gilliard, ante,* p. 587. Reported below: 647 F. Supp. 623.

Certiorari Granted—Vacated and Remanded

No. 86–364. BLAIR, SECRETARY OF HEALTH OF SOUTH DAKOTA, ET AL. *v.* FREEMAN ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Anderson* v. *Creighton, ante,* p. 635, and *New York* v. *Burger,* 482 U. S. 691 (1987). Reported below: 793 F. 2d 166.

No. 86–632. McMAHAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McNally* v. *United States*, *ante*, p. 350. Reported below: 788 F. 2d 234.

No. 86–700. VODILA *v.* CLELLAND ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656 (1987), and *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604 (1987). Reported below: 802 F. 2d 460.

No. 86–905. PHILADELPHIA ELECTRIC CO. *v.* BLACK GRIEVANCE COMMITTEE ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, *ante*, p. 711. Reported below: 802 F. 2d 648.

No. 86–1490. McWHERTER, GOVERNOR OF TENNESSEE, ET AL. *v.* BROOKS. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, *ante*, p. 711. JUSTICE BLACKMUN dissents and would deny certiorari. Reported below: 811 F. 2d 603.

No. 86–1628. TELLIS *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, *ante*, at 156. Reported below: 805 F. 2d 741.

Miscellaneous Orders

No. – – ——. GREAT AMERICAN FIRST SAVINGS BANK *v.* UNITED STATES; and
No. – – ——. ROGERS *v.* PLATT ET AL. Motions to direct the Clerk to file the petitions for writs of certiorari out of time denied.

No. A–2. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* AGAN. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE WHITE, and by him referred to the Court, denied.

No. D-580. In re Disbarment of Sisk. Mary Neal Sisk, of New York, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that her name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on October 20, 1986 [479 U. S. 912], is hereby discharged.

No. D-581. In re Disbarment of Hybsha. Disbarment entered. [For earlier order herein, see 479 U. S. 926.]

No. D-589. In re Disbarment of Benedict. Mark J. Benedict, of Austin, Tex., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on November 17, 1986 [479 U. S. 958], is hereby discharged.

No. D-611. In re Disbarment of Brickle, 480 U. S. 902. Motion for reconsideration of order of disbarment denied.

No. D-621. In re Disbarment of Folan. Disbarment entered. [For earlier order herein, see 480 U. S. 943.]

No. D-628. In re Disbarment of Brumfield. Disbarment entered. [For earlier order herein, see 481 U. S. 1010.]

No. D-632. In re Disbarment of Whitted. Earl Whitted, Jr., of Goldsboro, N. C., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on May 4, 1987 [481 U. S. 1035], is hereby discharged.

No. D-637. In re Disbarment of Hoagland. Robert D. Hoagland, of Charlotte, N. C., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 1, 1987 [482 U. S. 903], is hereby discharged.

No. D-640. In re Disbarment of Oxfeld. Emil Oxfeld, of South Orange, N. J., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 1, 1987 [482 U. S. 903], is hereby discharged.

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No. D-644. IN RE DISBARMENT OF JAFREE. It is ordered that Syed M. J. Igbal Jafree, of San Diego, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-645. IN RE DISBARMENT OF FREUDENBERG. It is ordered that Robert Edwin Freudenberg, of San Luis Obispo, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-646. IN RE DISBARMENT OF MADSEN. It is ordered that Harry A. Madsen, of Park Ridge, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85-1551. KARCHER, SPEAKER OF THE NEW JERSEY GENERAL ASSEMBLY, ET AL. *v.* MAY ET AL. C. A. 3d Cir. [Probable jurisdiction postponed, 479 U. S. 1062.] Motion of Ronald Sokalski et al. for leave to intervene as appellants denied. Alternative request for leave to file a brief as *amici curiae* granted.

No. 86-228. KUNGYS *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 479 U. S. 947.] Case restored to calendar for reargument. The parties are directed to file supplemental briefs addressing the following questions:

"(1) Whether petitioner is subject to denaturalization for want of good moral character under 8 U. S. C. §§ 1451(a), 1427(a), and 1101(f)(6), with particular attention to:

"(a) whether the 'false testimony' provision of 8 U. S. C. § 1101(f)(6) should be interpreted to include a requirement that the false testimony concern a material fact;

"(b) what standards should govern the determination under 8 U. S. C. § 1101(f)(6) whether 'false testimony' has been given 'for the purpose of obtaining any benefits under this chapter . . . .'; and

"(c) whether the latter determination is one of law or fact.

"(2)(a) Should the materiality standard articulated in *Chaunt* v. *United States*, 364 U. S. 350 (1960), be abandoned and, if so, what standard should govern the materiality inquiry under 8 U. S. C. § 1451(a); and

"(b) is the determination of materiality under 8 U. S. C. § 1451(a) one of law or fact.

"(3) When a misrepresentation has been established as 'material' within the meaning of 8 U. S. C. § 1451(a), must any further showing be made to establish that citizenship was 'procured by' that misrepresentation."

The parties also may address the questions presented in the petition for certiorari. The parties are directed to file opening briefs on or before August 3, 1987. Closing briefs are to be filed on or before August 24, 1987.

No. 86–327. MULLINS COAL CO., INC. OF VIRGINIA, ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029.] Motion of respondent Luke R. Ray for divided argument denied. Motion of respondent Gerald Stapleton for leave to proceed further herein *in forma pauperis* granted. Motion of respondent Gerald Stapleton for leave to file a brief on the merits out of time granted.

No. 86–810. MOSLEY *v.* BARTMAN ET AL., 479 U. S. 1054; and
No. 86–811. MOSLEY *v.* NOEL ET AL., 479 U. S. 1054. Motions of petitioner to direct the Clerk to file petitions for rehearing out of time denied.

No. 86–1278. HUSTLER MAGAZINE, INC., ET AL. *v.* FALWELL. C. A. 4th Cir. [Certiorari granted, 480 U. S. 945.] Motions for leave to file briefs as *amici curiae* filed by the following are granted: Law and Humanities Institute, Volunteer Lawyers for the Arts, Inc., Reporters Committee for Freedom of the Press et al., American Civil Liberties Union Foundation et al., Richmond Newspapers, Inc., et al., American Editorial Cartoonists et al., Association of American Publishers, Inc., and Home Box Office, Inc.

No. 86–1552. DEPARTMENT OF THE NAVY *v.* EGAN. C. A. Fed. Cir. [Certiorari granted, 481 U. S. 1068.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86–1672. COMMISSIONER OF INTERNAL REVENUE *v.* BOLLINGER ET AL. C. A. 6th Cir. [Certiorari granted, 482 U. S.

913.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86–1786. UNITED METAL PRODUCTS CORP. *v.* NATIONAL BANK OF DETROIT. C. A. 6th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Probable Jurisdiction Noted

No. 86–6757. COY *v.* IOWA. Appeal from Sup. Ct. Iowa. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 397 N. W. 2d 730.

Certiorari Granted

No. 86–684. CALIFORNIA *v.* GREENWOOD ET AL. Ct. App. Cal., 4th App. Dist. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 182 Cal. App. 3d 729, 227 Cal. Rptr. 539.

Certiorari Denied. (See also Nos. 86–1787 and 86–1948, *supra.*)

No. 85–1437. WILKINS *v.* SAYRES ET AL.; and WILKINS *v.* ROUSCH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 318.

No. 85–1519. HOOPER ET AL. *v.* DONTA. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 2d 716.

No. 85–1691. BERNSTEIN *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1026.

No. 85–1892. PAONE *v.* UNITED STATES;
No. 85–1901. RUSSOTTI *v.* UNITED STATES;
No. 85–1902. PICCARRETO *v.* UNITED STATES; and
No. 85–1949. MARINO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 782 F. 2d 386.

No. 86–11. FRANTZ ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 784 F. 2d 119.

No. 86–69. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* CONWAY, COMMISSIONER OF MOTOR VEHICLES, ET AL. (two cases); and

No. 86-276. CONWAY, COMMISSIONER OF MOTOR VEHICLES, ET AL. *v.* AMERICAN TRUCKING ASSNS., INC., ET AL. (two cases). Sup. Ct. Vt. Certiorari denied. Reported below: 146 Vt. 579, 508 A. 2d 408 (first cases); 146 Vt. 574, 508 A. 2d 405 (second cases).

No. 86-443. BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND ET AL. *v.* STANLEY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 786 F. 2d 1490.

No. 86-570. COUNTY OF FRESNO ET AL. *v.* SUPERIOR COURT OF THE COUNTY OF FRESNO (MOTSENBOCKER, REAL PARTY IN INTEREST). Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 86-815. DUFFY, SHERIFF, COUNTY OF SAN DIEGO, CALIFORNIA *v.* WARD. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 1329.

No. 86-934. PUSKARIC *v.* UNITED STATES; and JENKINS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 178.

No. 86-953. ABELL *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 99.

No. 86-1121. COUNTY OF MONROE ET AL. *v.* WEBER ET VIR. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 2d 796.

No. 86-1141. VAKALIS *v.* KAGAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 392.

No. 86-1144. CITY OF MONTGOMERY ET AL. *v.* EILAND. C. A. 11th Cir. Certiorari denied. Reported below: 797 F. 2d 953.

No. 86-1432. GOBLA *v.* CRESTWOOD SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 804 F. 2d 1248.

No. 86-1508. HANKINS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 810 F. 2d 205.

No. 86-1542. OLSON ET AL. *v.* EXKANO ET AL. C. A. 9th Cir. Certiorari denied.

No. 86-1600. BOTERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 59.

No. 86-1601. AZURIN ET AL. *v.* VON RAAB, COMMISSIONER OF CUSTOMS OF THE UNITED STATES CUSTOMS SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 803 F. 2d 993.

No. 86-1603. SINGH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 811 F. 2d 758.

No. 86-1713. CAPORALE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 806 F. 2d 1487.

No. 86-1756. HARRY R. CARLILE TRUST (ARTHURS, TRUSTEE) *v.* COTTON PETROLEUM CORP. ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 732 P. 2d 438.

No. 86-1762. MANHATTAN EYE, EAR & THROAT HOSPITAL *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 653.

No. 86-1766. CAUDILL *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 723 S. W. 2d 881.

No. 86-1771. ROE, A MINOR, BY HER NEXT FRIEND AND NATURAL GUARDIAN, ROE *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 398.

No. 86-1774. RAMIREZ *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 103 Nev. 817.

No. 86-1776. GAGNE, ADMINISTRATOR OF THE ESTATE OF GAGNE, ET AL. *v.* PUTNAL. C. A. 5th Cir. Certiorari denied. Reported below: 805 F. 2d 558.

No. 86-1778. NASSAU COUNTY REPUBLICAN COMMITTEE ET AL. *v.* CULLEN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 811 F. 2d 698.

No. 86-1779. DUNKLE, CLERK, CIRCUIT COURT, FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, ET AL. *v.* CAMDEN I CONDOMINIUM ASSN., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 805 F. 2d 1532.

No. 86-1780. ANGI, FKA NERAT *v.* SWACKER ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 426 Mich. 857.

No. 86-1789. CHONGRIS ET AL. *v.* BOARD OF APPEALS OF THE TOWN OF ANDOVER, MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 811 F. 2d 36.

No. 86-1795. KONDRAT *v.* BYRON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 78.

No. 86-1798. ATCHISON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 181 Ga. App. 351, 352 S. E. 2d 201.

No. 86-1799. INTERNATIONAL SOUND TECHNICIANS, CINE-TECHNICIANS & TELEVISION ENGINEERS OF THE MOTION PICTURE & TELEVISION INDUSTRIES, LOCAL 695, ET AL. *v.* MOTION PICTURE & VIDEOTAPE EDITORS GUILD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 800 F. 2d 973.

No. 86-1801. HUNTZINGER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 2d 787.

No. 86-1808. COSTIGAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 353 Pa. Super. 642, 506 A. 2d 1335.

No. 86-1811. ANEST ET AL. *v.* LAKE COUNTY, ILLINOIS, ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 147 Ill. App. 3d 243, 497 N. E. 2d 1327.

No. 86-1814 PINNER *v.* SCHMIDT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 805 F. 2d 1258.

No. 86-1832. TATA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 813 F. 2d 105.

No. 86-1848. SHELTON ET UX., DBA UNIVERSITY VILLAGE MUSIC CENTER *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 714.

No. 86-1859. PROCTOR HOPSON POST MEMORIAL ASSN., INC. *v.* CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 86-1881. BARCELONA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 814 F. 2d 165.

No. 86-1886. COOPER STEVEDORING CO., INC., ET AL. *v.* AETNA CASUALTY & SURETY CO. Sup. Ct. Ala. Certiorari denied. Reported below: 504 So. 2d 215.

No. 86-1897. FINN *v.* FINN. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 517 A. 2d 317.

No. 86-1907. PAUL *v.* FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 259 U. S. App. D. C. 1, 812 F. 2d 717.

No. 86-1916. FLAHIVE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 654.

No. 86-1928. MIMS, INDIVIDUALLY AND DBA THE EDGEFIELD ADVERTISER *v.* EDGEFIELD COUNTY COMMUNICATIONS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 795 F. 2d 82.

No. 86-6183. VITATOE *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 204.

No. 86-6221. JONES *v.* FIRST AMERICAN TITLE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 840.

No. 86-6331. KELLY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 183 Cal. App. 3d 1235, 228 Cal. Rptr. 681.

No. 86-6445. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 805 F. 2d 210.

No. 86-6523. HAMILTON *v.* NIX, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 809 F. 2d 463.

No. 86-6672. GREGORY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 679.

No. 86-6759. JONES *v.* HOWARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 713.

No. 86-6763. PATTON *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 398.

No. 86-6826. FREEMAN *v.* HARTIGAN, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 815 F. 2d 708.

No. 86-6836. WALLACE ET AL. *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-6840. BRASIER *v.* DOUGLAS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 815 F. 2d 64.

No. 86-6842. FLOWERS *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 77.

No. 86-6843. JERRY-EL *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT PITTSBURGH. C. A. 3d Cir. Certiorari denied.

No. 86-6850. CURRINGTON *v.* DUNCAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1507.

No. 86-6851. ALLEN *v.* ASHCROFT, GOVERNOR OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 86-6853. RUEBKE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 240 Kan. 493, 731 P. 2d 842.

No. 86-6856. MARSHALL, AKA MUSTAFA *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 806 F. 2d 1068.

No. 86-6857. KNIGHT *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 54.

No. 86-6860. YUHAS *v.* STROUD. Ct. App. Mich. Certiorari denied.

No. 86-6866. DENNIS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 86-6868. ELLIOTT *v.* STAGNER, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY, SOLEDAD, CALIFORNIA, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 86-6871. KEHOE *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 86-6872. FOREMAN *v.* NATIONAL TREASURY EMPLOYEES UNION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 86-6873. CARROLL *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-6876. HARRISON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 86-6882. VESAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 203.

No. 86-6883. MARTIN *v.* SEITER. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 1035.

No. 86-6885. SCHMIDT *v.* SCHMIDT ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-6893. SWINK *v.* CITY OF PAGEDALE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 810 F. 2d 791.

No. 86-6898. SPANN *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 654.

No. 86-6918. SHIBUYA *v.* COURT OF APPEALS OF NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 86-6926. HEPPERLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 810 F. 2d 836.

No. 86-6927. AARON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 502 So. 2d 396.

No. 86-6928. TIMMONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 1412.

No. 86-6939. DAVIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 815 F. 2d 692.

No. 86-6940. COGHLAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 683.

No. 86-6943. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 716.

No. 86-6945. CORDOBA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 2d 872.

No. 86-6961. CONKLIN *v.* TARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 86-6962. BUITRAGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 1403.

No. 86-6972. COLLINS *v.* BROWN, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS. Sup. Ct. Mich. Certiorari denied. Reported below: 428 Mich. 868.

No. 86-6980. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1229.

No. 85-5534. MITCHELL *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 2d 886.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

In *Strickland* v. *Washington*, 466 U. S. 668 (1984), this Court held that the Sixth Amendment's promise of effective assistance of counsel is not breached unless the criminal defendant can show that his attorney's conduct fell beyond the bounds of professional competence and thereby prejudiced his defense. *Id.*, at 687. Since *Strickland* was decided, the Court has never identified an instance of attorney dereliction that met its stringent standard. Most recently, this Court rejected a claim that inadequate investigation of mitigating circumstances constituted ineffective assistance of counsel in a capital case. See *Burger* v. *Kemp*, *ante*, p. 776. Lest we permit the lower courts to conclude that the Sixth Amendment guarantees no more than that "a person who happens to be a lawyer is present at trial alongside the accused"—a notion expressly disavowed in *Strickland*, *supra*, at 685—the Court should now give life to the *Strickland* standard. Accordingly, I would grant certiorari to consider the substantial allegation that counsel's performance, before the tribunal that sentenced petitioner to die, fell short of minimally effective representation.

I

On November 5, 1974, petitioner pleaded guilty to the murder of a 14-year-old boy in the course of a convenience-store robbery. At the sentencing proceeding conducted without a jury, the State called five witnesses and introduced documentary evidence in support of its contention that petitioner should receive the death penalty. Defense counsel called no witnesses and presented no mitigating evidence. The court sentenced petitioner to die. After affirmance of his conviction, petitioner sought a writ of habeas corpus on the ground that he was denied effective assistance of counsel at the sentencing phase of his trial. The District Court concluded that the "tactical decisions" of petitioner's counsel were professionally reasonable. *Mitchell* v. *Hopper*, 564 F. Supp. 780, 786 (SD Ga. 1983). The Court of Appeals, acknowledging that counsel's performance raised a "difficult question," nevertheless affirmed on the ground that it was the result of strategic choices. 762 F. 2d 886, 889–890 (CA11 1985).

The habeas corpus record before the District Court demonstrates that petitioner's appointed attorney made *no* attempt to interview *any* potential mitigating witnesses. 5 Record 21–22. He spoke to no member of petitioner's family, with the exception of petitioner's father, with whom he spoke by telephone on two occasions. Counsel apparently initiated these contacts for the purpose of requesting that the family hire an attorney to relieve him of his obligation to represent petitioner. *Id.*, at 23–24. Counsel made *no* inquiries into his client's academic, medical, or psychological history.

Nor did counsel pursue a vigorous defense with respect to the circumstances of the crime. He did not interview the police officer who witnessed petitioner's confession, which the State used to establish the existence of certain aggravating circumstances in support of the death sentence, even though petitioner had told him that the officer—the cousin of the victim—had held a gun to petitioner's head to extract the confession. Counsel's reason for not speaking to the officer was that "I personally don't like the man." 6 Record 35. Counsel did not interview the sole witness to the crime, who provided the key testimony for the prosecution at sentencing. *Id.*, at 37. He filed *no* pretrial motions on petitioner's behalf. *Id.*, at 45.

Counsel's failure to investigate mitigating circumstances left him ignorant of the abundant information that was available to an attorney exercising minimal diligence in fighting for Billy Mitchell's life. The affidavits of individuals who would have testified on petitioner's behalf fill 170 pages of the record in the District Court. Among these potential witnesses are family members, a city councilman, a former prosecutor, a professional football player, a bank vice president, and several teachers, coaches, and friends.

Had defense counsel tapped these resources, he would have been able to present the sentencing judge with a picture of a youth who, despite growing up in "the most poverty-stricken and crime-ridden section of Jacksonville, Florida," 4 Record 989, had impressed his community as a person of exceptional character.

He had been captain of the football team; leader of the prayer before each game; an above-average student; an active member of the student council, school choir, church choir, glee club, math club, and track team; a Boy Scout; captain of the patrol boys; and an attendant to the junior high school queen.

Examples of the favorable impression that petitioner left on his community abound in the record. One such example is the statement of petitioner's former teacher and athletic coach at Butler High School:

> "To understand what an exceptional person Billy Mitchell was at that time, one must understand that, while a comprehensive high school, Butler at the time was a segregated school in the middle of a very impoverished area—what might be called today a ghetto. In that locale and setting, Billy Mitchell was a rarity because of the exceptional character he displayed at Butler." *Id.*, at 958–959.

Acquaintances and professionals described petitioner as "the type of person people naturally got along with," *id.*, at 967; "the kind of person you could depend on for assistance in everything," *id.*, at 956; "a hard worker who devoted a lot of time to school activities, especially activities involving younger kids," *ibid.*; "a fine student and athlete," *id.*, at 980; a person of "character and personality . . . so atypical for someone convicted of a serious crime," *id.*, at 1001; "not . . . the type of person that should be executed and given no further chance to live out a meaningful life." *id.*, at 967. Petitioner's sisters explained that petitioner took care of his 11 brothers and sisters while his mother worked, *id.*, at 953, and that petitioner took a job in the eighth grade to help support his family, *id.*, at 941.

An account of what happened to this well-adjusted young person was also readily available to anyone who took the time to ask. When petitioner was 16 years old, his parents were divorced, and soon thereafter petitioner got into trouble. He and two friends were arrested for attempted robbery. Petitioner professed his innocence, but was persuaded by his father to plead guilty, *id.*, at 948, because "things would go easier for him," *id.*, at 963. The charges against the two friends were dropped. Petitioner was sentenced to six months in prison, where he was subjected to repeated violent homosexual attacks, experienced severe depression, and lost 30 pounds. *Id.*, at 996–997. When he was released, he continued to be highly depressed, and eventually committed the crime for which he received a sentence of death.

II

Counsel's explanation for his total lack of preparation for the sentencing hearing is that he carried an "ace in the hole." 6 Record 43. His sole strategy for representing his client's interest rested on his belief that, under Georgia law, the State would not be permitted to introduce any evidence of aggravating circumstances of which the defense had not been notified in writing. Prior to sentencing, the State had provided petitioner's counsel with oral notice of the aggravating circumstances upon which it would rely, but had not furnished written notice. Although the state statute upon which counsel's theory relied did not mention written notice, and no court decision had ever required that such notice be in writing, counsel was content to rest his entire defense, and the fate of his client, on an untried legal theory. At sentencing, counsel took the first opportunity to object to the admission of aggravating evidence of which he had not received prior written notice; the court promptly overruled his objection, and the "ace in the hole" was gone. *Id.*, at 198. Even if counsel had been correct in his interpretation of state law, of course, the State could have provided the requisite written notice at any time before the hearing, which would have left petitioner equally defenseless.

At the habeas corpus hearing, petitioner's attorney also claimed that he had not wished to present any mitigating character evidence because that would have opened the door to the State's introduction of petitioner's prior conviction. 5 Record 16. Under some circumstances, such a decision might be considered a reasonable strategy. In this case, however, it was patently unreasonable. Counsel conceded, at the habeas proceeding, that he had known nothing of the facts and circumstances of the prior conviction, other than that it was a felony. 6 Record 47. If he had made an inquiry, and if he had acquainted himself at all with what type of mitigating character evidence was available, he might have been in a position to make a professional judgment as to whether the substantial mitigating evidence would be outweighed by the prejudice resulting from the introduction of petitioner's guilty plea to attempted robbery at the age of 16, the two alleged accomplices to which had been released. Further, he might have decided to emphasize to the court that the prior conviction was intimately connected to the entire sequence of events that formed a compelling case for mitigation. But no such balancing was made, for counsel had no information to place on either side of the scales. Moreover, under state law, the prior conviction would have been admissible even though the defense put on no evidence. See 762 F. 2d, at 890. If counsel in this case made any decisions at all, they were barren of even minimal supporting information or knowledge.

Counsel's final excuse for conducting no defense is a vague perception that the client was reluctant to have the attorney probe into his background, for reasons counsel did not know and did not attempt to find out. 6 Record 63. Counsel felt that petitioner, who had finished two years in a junior college, was intelligent and capable of making his own decisions. There is no indication, however, that counsel took any steps to inform his client of the consequences of the various alternatives. Although counsel explained to petitioner his "ace in the hole" strategy for the sentencing hearing, *ibid.*, it is not clear that he warned petitioner that the strategy might fail, or that petitioner stood a good chance of being sentenced to death. Nor is there any indication that the attorney explained the importance of mitigating evidence at a sentencing proceeding, or the potential value of petitioner's taking the stand himself. Counsel has not alleged that petitioner insisted on any particular line of defense or on any particular conduct by counsel. Rather, he provided no services on behalf of his client because he felt that the client was reluctant to involve his family and friends, perhaps out of a "sense of embarrassment." *Ibid.*

Our decisions have recognized that attorneys must have a wide degree of latitude to make strategic decisions on the basis of their knowledge of the law. We have stressed that the judgment of an attorney should not be second-guessed, as long as it falls within the sphere of professional reasonableness. *Strickland* v. *Washington*, 466 U. S., at 689. Nevertheless, an attorney's decision to advance a defense that is wholly unfounded in law, combined with a failure to investigate the merit of accepted and persuasive defenses, cannot be characterized as "sound trial strategy." See *Michel* v. *Louisiana*, 350 U. S. 91, 101 (1955). Indeed, such a decision is not strategic at all; it is incompetent. "The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis . . . ." *Hill* v. *Lockhart*, 474 U. S. 52, 62 (1985) (WHITE, J., concurring in judgment). In this case, that failure was aggravated by the additional failure to discover what meritorious defenses were available before rejecting them in favor of a frivolous technical defense. This conduct is professionally unreasonable.

As a result of counsel's nonfeasance, no one argued to the sentencing judge that petitioner should not die. The judge heard only a technical argument regarding the admissibility of aggravating circumstances without prior written notice, which he consistently rejected, in addition to a reference to petitioner's youth. These arguments were hardly an effective rebuttal to the testimony of the victim's mother and the police officers. Prejudice to petitioner's case is obvious when not even a suggestion that his life had some value, that his crime was aberrational, or that he was suffering from severe depression reached the ears and the conscience of the sentencing judge. See *Burger* v. *Kemp*, *ante*, at 816 (BLACKMUN, J., dissenting). The judge heard not even a plea for mercy.

III

This Court has repeatedly insisted that unfettered consideration of mitigating evidence is an essential aspect of the process by which the States adjudicate the appropriateness of putting a person to death. See, *e. g.*, *Sumner* v. *Shuman*, *ante*, at 76; *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978); *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976). Accordingly, we have not permitted a State to insulate the capital sentencer from considerations favorable to the defendant. The reliability of the process depends upon the sentencer's consideration of both tangibles and intangibles, see *Caldwell* v. *Mississippi*, 472 U. S. 320, 330 (1985), in evaluating the individual character of the defendant and his acts. In light of the importance that this Court has placed upon the role of mitigating evidence in capital-sentencing decisions, I cannot believe that *Strickland* was intended to permit a defendant to be sentenced to death solely on the basis of the State's evidence, when a powerful defense easily could have been marshaled on his behalf. Any reasonable standard of professionalism governing the conduct of a capital defense must impose upon the attorney, at a minimum, the obligation to explore the aspects of his client's character that might persuade the sentencer to spare his life. Without even this effort by the defense, the adversarial process breaks down.

By denying certiorari in this compelling case, the Court has refused to apply *Strickland* in a manner that gives meaning to the constitutional values from which it was derived. I dissent.

No. 86-419. PATTON ET AL. *v.* SCURBEER. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 791 F. 2d 1094.

No. 86-1505. PRESTRESS ENGINEERING CORP. *v.* GONZALEZ ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 115 Ill. 2d 1, 503 N. E. 2d 308.

JUSTICE WHITE, dissenting.

This case raises the question whether a state-law claim for retaliatory discharge is pre-empted by § 301 of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185(a), when the suing employee is covered by a collective-bargaining agreement. The Illinois Supreme Court here, relying on its earlier opinion in *Midgett* v. *Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N. E. 2d 1280, cert. denied, 472 U. S. 1032 (1984) and 474 U. S. 909 (1985), held that the state claim was not pre-empted. The Court of Appeals for the Eighth Circuit, faced with an almost identical state-law claim for retaliatory discharge, concluded that under our opinion in *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202 (1985), § 301 pre-empted the state-law claim. *Johnson* v. *Hussmann Corp.*, 805 F. 2d 795, 797 (1986) (Missouri). One other Court of Appeals has come to a similar conclusion. See *Vantine* v. *Elkhart Brass Manufacturing Co.*, 762 F. 2d 511, 517-518 (CA7 1985) (Indiana). The Second Circuit, just three months ago, concluded that Connecticut's retaliatory-discharge claim was not pre-empted by § 301. *Baldracchi* v. *Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F. 2d 102 (1987). The Illinois Supreme Court has interpreted federal law in a manner consistent with the Second Circuit but directly contrary to the Seventh and Eighth Circuits. I would grant the petition and resolve the conflict, rather than wait until the conflict invites more litigation and becomes more acute.

No. 86-1800. ATKINSON ET AL. *v.* ANADARKO BANK & TRUST CO. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 808 F. 2d 438.

No. 86-1815. CREDIT BUREAU SERVICES–NEW ORLEANS, DBA CHILTON CORP. *v.* PINNER. C. A. 5th Cir. Motions of Trans

Union Credit Information Co., Associated Credit Bureaus, Inc., and Credit Bureau, Incorporated of Georgia for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 805 F. 2d 1258.

No. 86-5391. WILLIAMS *v.* LOUISIANA. Sup. Ct. La.;
No. 86-6506. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 86-6825. BEAVER *v.* VIRGINIA. Sup. Ct. Va.;
No. 86-6921. TOMPKINS *v.* FLORIDA. Sup. Ct. Fla.; and
No. 86-6969. SMITH *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: No. 86-5391, 490 So. 2d 255; No. 86-6506, 727 P. 2d 1366; No. 86-6825, 232 Va. 521, 352 S. E. 2d 342; No. 86-6921, 502 So. 2d 415; No. 86-6969, 812 F. 2d 1050.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 86-6224. TAFERO *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of National Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 796 F. 2d 1314.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 86-6985 (A-942). EVANS *v.* THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 809 F. 2d 239.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 85-2121. ARIZONA *v.* MAURO, 481 U. S. 520;

No. 86-1136. PACYNA *v.* MARSH, SECRETARY OF THE ARMY, 481 U. S. 1048;

No. 86-1669. BRANSON *v.* NORTHINGTON ET AL., 481 U. S. 1044; and

No. 86-6702. COSNER *v.* OREGON, 481 U. S. 1066. Petitions for rehearing denied.

No. 85-2102. MONTAUK-CARIBBEAN AIRWAYS, INC., DBA LONG ISLAND AIRLINES *v.* HOPE ET AL., 479 U. S. 872; and

No. 86-6429. MCCONE *v.* DISTRICT COURT OF ALBANY COUNTY ET AL., 481 U. S. 1020. Motions for leave to file petitions for rehearing denied.

No. 86-1363. WANGRUD *v.* OREGON, 481 U. S. 1009. Petition for rehearing and other relief denied.

No. 86-6750. COLEMAN *v.* BROWN, WARDEN, ET AL., 482 U. S. 909. Motion of respondents for leave to file response to petitioner's petition for rehearing denied. Petition for rehearing denied.

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE WHITE be, and he is hereby, assigned to the Eleventh Circuit as Circuit Justice, effective June 26, 1987, pending further order.

JULY 6, 1987

Certiorari Denied

No. 87-5038 (A-17). WHITLEY *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 823 F. 2d 55.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

JULY 7, 1987

Certiorari Denied

No. 87-5052 (A-23). THOMPSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay. Reported below: 821 F. 2d 1054.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 87-5053 (A-24). THOMPSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 821 F. 2d 1080.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 87-5070. EVANS *v.* CABANA, ACTING COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 821 F. 2d 1065.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 86-6985 (A-3). EVANS *v.* CABANA, ACTING COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, *ante*, p. 1033. Application for stay of execution of sentence of death, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application. Petition for rehearing denied.

JULY 9, 1987

Dismissals Under Rule 53

No. 86-2057. JENNESS, TRUSTEE *v.* OFH, INC. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 807 F. 2d 994.

No. 86-793. KANSAS CITY POWER & LIGHT CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL. Sup. Ct. Kan. [Probable jurisdiction noted, 479 U. S. 1082.] Appeal dismissed under this Court's Rule 53.

JULY 19, 1987

Certiorari Denied

No. 87-5130 (A-56). CELESTINE *v.* BUTLER, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 823 F. 2d 74.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

JULY 23, 1987

Miscellaneous Orders

No. A-65. LINCOLN PARK NURSING & CONVALESCENT HOME *v.* KAHN, GUARDIAN AD LITEM OF JOBES, ET AL. Sup. Ct. N. J.

Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. A-78 (87-5161). WATSON *v.* BUTLER, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins in Parts II and III, dissenting.

I

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), we would grant the stay application and the petition for writ of certiorari.

II

Even if we did not hold these views, we would nonetheless grant the stay application in order to hold the case for *Lowenfield* v. *Phelps*, No. 86-6867. At issue in *Lowenfield* is the constitutionality of a death-sentencing procedure where the aggravating factor found by the jury duplicates the jury's findings in the guilt phase and thus fails to narrow the class of defendants eligible for the death penalty.

In this case, Watson was found guilty of first-degree murder because he killed while "engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery." La. Rev. Stat. Ann. § 14.30(A)(1) (West 1986). Louisiana law requires that the sentencing jury find beyond a reasonable doubt that at least one statutory aggravating factor exists before a death sentence may be imposed. La. Code Crim. Proc. Ann., Art. 905.3 (West Supp. 1987). Article 905.4 of the Louisiana Code of Criminal Procedure (West 1984 and Supp. 1987) provides that "[t]he following shall be considered aggravating circumstances," and lists 10 circumstances, which are labeled as subsections (a) through (j). The jury in Watson's case found that Watson had committed the acts described in subsection (a): he "was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery."[1] Specifically, the jury determined that Watson committed armed robbery and aggravated rape.

If the commission of armed robbery and aggravated rape constitutes only a single aggravating circumstance, then Watson presents exactly the same claim as Lowenfield.[2] In the majority of cases that have required a tally of aggravating circumstances, the Louisiana Supreme Court has considered the presence of more than one felony under Article 905.4(a) to count as only a single aggravating factor. See, *e. g.*, *State* v. *Carmouche*, 508 So. 2d 792 (1987); *State* v. *Bates*, 495 So. 2d 1262 (1986); *State* v. *Andrews*, 452 So. 2d 687 (1984); *State* v. *Jordan*, 420 So. 2d 420 (1982); *State* v. *Myles*, 389 So. 2d 12 (1979). In some other cases, including this one, *State* v. *Watson*, 449 So. 2d 1321 (1984), the Louisiana Supreme Court appears to have viewed each felony as a separate aggravating factor. That court, however, has not had the opportunity to address this issue explicitly. In our view, until the Louisiana Supreme Court gives the statute a definitive interpretation, this Court should grant the application for stay, in order to hold for *Lowenfield*.

III

Four Members of this Court consider the above view sufficiently compelling to have voted to hold this case until *Lowenfield* is decided. Three votes suffice to hold a case, but it takes five votes to stay an execution. The Court today thus permits Mr. Watson's legal claim to stay alive while condemning Watson himself to die under a sentencing scheme that within a matter of months the Court may conclude is unconstitutional. Half the Members of this Court believe that Watson's claim might be indistinguishable from

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[1] The jury also found a second aggravating circumstance that Watson had "a significant prior history of criminal activity." This aggravating circumstance has since been invalidated by the Louisiana Supreme Court as unconstitutionally vague under the Eighth Amendment. *State* v. *David*, 468 So. 2d 1126 (1984).

[2] The District Court denied Watson's claim and stated only: "Suffice it to say that the Fifth Circuit Court of Appeals, whose ruling binds this court has decided this claim adversely to petitioner. *Lowenfield* v. *Phelps*, 817 F. 2d 285 (1987)." No. 87-3391 (ED La. July 21, 1987). The Court of Appeals affirmed the judgment, agreeing with the "reasons stated succinctly and correctly" by the District Court. 823 F. 2d 842, 843 (CA5 1987).

Lowenfield's, yet tonight Watson will be executed while Lowenfield may prevail and be spared. This prospect is the ultimate derogation of the Court's duty to provide equal justice under law.

We dissent.

JULY 29, 1987

Miscellaneous Orders

No. A–909. POLYAK *v.* HAMILTON, JUDGE, CIRCUIT COURT OF LAWRENCE COUNTY, ET AL. C. A. 6th Cir. Motion to compel the Clerk to docket a jurisdictional statement and a petition for writ of certiorari, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–910. POLYAK *v.* BUFORD EVANS & SONS. Motion to compel the Clerk to file a petition for writ of common-law certiorari, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–934. STEIN *v.* UNITED STATES. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–8 (86–7154). WHITE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

No. D–597. IN RE DISBARMENT OF FABRÉ. Disbarment entered. [For earlier order herein, see 479 U. S. 1026.]

No. D–612. IN RE DISBARMENT OF BING. Disbarment entered. [For earlier order herein, see 480 U. S. 913.]

No. D–620. IN RE DISBARMENT OF DECELLO. Disbarment entered. [For earlier order herein, see 480 U. S. 943.]

No. D–624. IN RE DISBARMENT OF HALLOWS. Disbarment entered. [For earlier order herein, see 481 U. S. 1002.]

No. D–626. IN RE DISBARMENT OF MAZELIS. Disbarment entered. [For earlier order herein, see 481 U. S. 1002.]

No. D–629. IN RE DISBARMENT OF MIRTO. Disbarment entered. [For earlier order herein, see 481 U. S. 1011.]

No. D–631. IN RE DISBARMENT OF BURKE. Disbarment entered. [For earlier order herein, see 481 U. S. 1027.]

No. D-633. IN RE DISBARMENT OF MONAGHAN. Disbarment entered. [For earlier order herein, see 481 U. S. 1045.]

No. D-638. IN RE DISBARMENT OF HAEBERLE. Disbarment entered. [For earlier order herein, see 482 U. S. 903.]

No. D-647. IN RE DISBARMENT OF ELDEN. It is ordered that William Elden, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-648. IN RE DISBARMENT OF MONOKER. It is ordered that David Monoker, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-649. IN RE DISBARMENT OF FILSOOF. It is ordered that Fred F. Filsoof, of Atlanta, Ga., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Certiorari Denied

No. 87-5193 (A-94). BROGDON *v.* BUTLER, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 824 F. 2d 338.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 86-1640. PACE RESOURCES, INC. *v.* SHREWSBURY TOWNSHIP ET AL., 482 U. S. 906;

No. 86-1648. WEST ET AL. *v.* MULTIBANCO COMERMEX, S. A., ET AL., 482 U. S. 906; and

No. 86-1671. COKER *v.* GIELOW, CHAIRMAN, RAILROAD RETIREMENT BOARD, ET AL., 482 U. S. 906. Petitions for rehearing denied.

No. 86–1730. SETERA *v.* TEXAS A & M UNIVERSITY ET AL., 482 U. S. 928;

No. 86–5984. BATES *v.* LOUISIANA, 481 U. S. 1042;

No. 86–6175. WILSON *v.* DENTON ET AL., 482 U. S. 931;

No. 86–6491. JACKSON *v.* FLORIDA, *ante*, p. 1010;

No. 86–6519. COFIELD *v.* MERIT SYSTEMS PROTECTION BOARD, 482 U. S. 916;

No. 86–6677. GASKINS *v.* SOUTH CAROLINA, 482 U. S. 909;

No. 86–6713. WILLIAMS *v.* BLACKBURN, WARDEN, 482 U. S. 917;

No. 86–6730. TURNER *v.* FUERST, 482 U. S. 917;

No. 86–6732. PRUETT *v.* VIRGINIA, 482 U. S. 931;

No. 86–6753. ATTWELL *v.* METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY ET AL., 482 U. S. 908;

No. 86–6776. BUTLER *v.* WELSCHMEYER, 482 U. S. 918;

No. 86–6786. MARTIN *v.* LITTLE, BROWN & CO., INC., ET AL., 482 U. S. 930; and

No. 86–6804. BROWN-BEY *v.* UNITED STATES MARSHAL, 482 U. S. 908. Petitions for rehearing denied.

JULY 31, 1987

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE SCALIA be, and he is hereby, assigned to the Eleventh Circuit as Circuit Justice, pending further order. The order of June 26, 1987 [*ante*, p. 1034], assigning JUSTICE WHITE to the Eleventh Circuit as Circuit Justice is vacated. It is further ordered that THE CHIEF JUSTICE be, and he is hereby, assigned to the Fifth Circuit, in addition to JUSTICE WHITE, effective August 1, 1987, pending further order.

AUGUST 3, 1987

Dismissal Under Rule 53

No. 86–1927. CHICAGO COMMODITIES, INC., ET AL. *v.* COMMODITIES FUTURES TRADING COMMISSION ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 811 F. 2d 1262.

Miscellaneous Order

No. A–69. CASTILLE, DISTRICT ATTORNEY, PHILADELPHIA COUNTY *v.* HARRIS ET AL. C. A. 3d Cir. Application for recall and stay of mandate, presented to JUSTICE WHITE, and by him referred to the Court, denied. The temporary stay heretofore entered on July 23, 1987, is vacated and the application for recall and stay is in all respects denied.

AUGUST 5, 1987

Dismissal Under Rule 53

No. 87-123. SCHULMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 817 F. 2d 1355.

AUGUST 20, 1987

Miscellaneous Order

No. A-147. WHITLEY, WARDEN *v.* NEUSCHAFER. Application of the Attorney General of Nevada for an order to vacate the stay of execution of sentence of death entered by the United States District Court for the District of Nevada, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

AUGUST 21, 1987

Certiorari Denied

No. 87-5319 (A-148). RAULT *v.* BUTLER, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 826 F. 2d 299.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

AUGUST 26, 1987

Miscellaneous Orders

No. A-932. BECHTEL ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. Sup. Ct. Cal. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-14. WINSLOW ET AL. *v.* COYTE, JUDGE, MORGAN COUNTY DISTRICT COURT, COLORADO, ET AL. Application for injunction and other relief, addressed to JUSTICE BLACKMUN and referred to the Court, denied. JUSTICE WHITE took no part in the consideration or decision of this application.

No. A-35. AMBULANCE SERVICE OF RENO, INC., DBA 911 PARAMEDICS *v.* NEVADA AMBULANCE SERVICES, INC., DBA MEDIC I, ET AL. Application for temporary restraining order and other relief, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A-62. BENJAMIN *v.* COMMITTEE ON PROFESSIONAL STANDARDS. Ct. App. N. Y. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 85-2079. LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA ET AL. *v.* ADVANCED LIGHTWEIGHT CONCRETE CO., INC. C. A. 9th Cir. [Certiorari granted, 479 U. S. 1083.] Motions of Chamber of Commerce of the United States and Associated General Contractors of America, Inc., for leave to file briefs as *amici curiae* granted.

No. 86-492. BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE *v.* UNITED TECHNOLOGIES CORP. C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029.] Motion of Chamber of Commerce of the United States for leave to file a supplemental brief *amicus curiae* granted.

No. 86-761. FORRESTER *v.* WHITE. C. A. 7th Cir. [Certiorari granted, 479 U. S. 1083.] Motion of Illinois Judges Association for leave to file a brief as *amicus curiae* granted.

No. 86-935. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* PUBLIC EMPLOYMENT RELATIONS BOARD ET AL. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction noted, *ante*, p. 1004.] Motion of appellant to dispense with printing the joint appendix granted.

No. 86-1415. MARINO ET AL. *v.* ORTIZ ET AL.; and COSTELLO ET AL. *v.* NEW YORK CITY POLICE DEPARTMENT ET AL. C. A. 2d Cir. [Certiorari granted, 481 U. S. 1047 and 482 U. S. 912.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Dov Hikind et al. for leave to file a brief as *amici curiae* granted.

Rehearing Denied

No. 86-1141. VAKALIS *v.* KAGAN ET AL., *ante*, p. 1020. Petition for rehearing denied.

No. 86–1599. SANCHEZ *v.* ILLINOIS, *ante*, p. 1010;

No. 86–1727. CONNOR *v.* SACHS ET AL., *ante*, p. 1001;

No. 86–1742. MARMOTT ET AL. *v.* MARYLAND LUMBER CO. ET AL., 482 U. S. 929;

No. 86–1759. WOOD ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 406, ET AL., *ante*, p. 1006;

No. 86–1808. COSTIGAN *v.* PENNSYLVANIA, *ante*, p. 1022;

No. 86–6221. JONES *v.* FIRST AMERICAN TITLE INSURANCE CO. ET AL., *ante*, p. 1023;

No. 86–6506. SMITH *v.* OKLAHOMA, *ante*, p. 1033;

No. 86–6645. SAWYER *v.* ILLINOIS, 482 U. S. 930;

No. 86–6654. GUEST *v.* ILLINOIS, *ante*, p. 1010;

No. 86–6685. GLENN *v.* OHIO, 482 U. S. 931;

No. 86–6767. IN RE CALDWELL, *ante*, p. 1004;

No. 86–6802. LINDER *v.* LINDER, *ante*, p. 1008;

No. 86–6821. JROE *v.* CARHART ET AL., *ante*, p. 1011;

No. 86–6844. FOREMAN *v.* MERIT SYSTEMS PROTECTION BOARD, *ante*, p. 1001;

No. 86–6872. FOREMAN *v.* NATIONAL TREASURY EMPLOYEES UNION ET AL., *ante*, p. 1024;

No. 86–6876. HARRISON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 1025;

No. 86–6883. MARTIN *v.* SEITER, *ante*, p. 1025; and

No. 86–6927. AARON *v.* ALABAMA, *ante*, p. 1025. Petitions for rehearing denied.

No. 85–5348. BUCHANAN *v.* KENTUCKY, *ante*, p. 402. Petition for rehearing or modification of opinion denied.

No. 86–6758. HATTON *v.* MINNESOTA, 482 U. S. 911; and

No. 86–6816. MOORE *v.* AMERICAN SAVINGS & LOAN ASSN. ET AL., *ante*, p. 1001. Motions for leave to file petitions for rehearing denied.

AUGUST 27, 1987

Certiorari Denied

No. 86–7154. WHITE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 809 F. 2d 1478.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 87-5362 (A-172). WHITE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 828 F. 2d 10.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The State of Florida will execute Beauford White tomorrow morning without so much as a determination by its own courts that his death sentence is currently legal. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (dissenting opinion). But even were I not of that view, I would dissent from this Court's tacit approval of a death sentence whose factual predicate the executing State has not reviewed for consistency with intervening Supreme Court precedent. I would vote to stay White's execution, grant his petition for writ of certiorari, and reverse the judgments below denying habeas relief.

I

As summarized by the Florida Supreme Court, the relevant facts of this case are as follows: White and two companions entered a home under a subterfuge to rob its occupants. All three were armed and wore masks covering their faces from the nose down. After blindfolding and binding the sole occupant, the three robbers ransacked the house in search of valuables. Within an hour, seven acquaintances of the occupant appeared at the house. The three robbers bound the newcomers. At some point, the mask of one of White's companions fell off, exposing his face to the victims. Consequently, the three discussed the need to kill the victims. White voiced his opposition, but to no avail; his companions overrode him. White's two companions separated the victims into two rooms and systematically shot all eight in the back of the head, killing six. White remained in the house throughout, but did not participate in the shootings. The three co-felons then returned to White's motel room to divide their loot. A fourth participant, a wheelman who never entered the home, testified that he and White were both duped into what he later discovered was a planned contract murder of one or two of the victims. He also testified that White was visibly shaken afterwards and refused to help dispose of the weapons.

A Florida jury convicted White of six counts of first-degree murder, two counts of attempted first-degree murder, and four counts of robbery, and unanimously recommended a life sentence. The trial judge, disregarding the jury's unanimous recommendation, imposed a death sentence. After this Court's decision in *Enmund* v. *Florida*, 458 U. S. 782 (1982), the Florida courts entertained a petition for postconviction relief to determine whether White's conduct exhibited the requisite intent to sustain a death sentence under that intervening case. The Florida Supreme Court reversed a lower court finding that *Enmund* was not satisfied. The court held that White had the requisite intent (within the meaning of *Enmund*) because, "whatever [White] might have originally intended or contemplated about lethal force being used in the robbery, it can hardly be said that he did not realize that lethal force was going to be used in carrying out the robbery." *State* v. *White*, 470 So. 2d 1377, 1380 (Fla. 1985).

Since then, White has twice sought postconviction relief from the Florida courts. He has argued, among other things, that he is entitled to a new determination as to whether his conduct was sufficiently culpable to satisfy the new culpability standard that this Court articulated in *Tison* v. *Arizona*, 481 U. S. 137 (1987). On each occasion, the state courts barred his application as untimely. White then filed a habeas petition in the United States District Court for the Southern District of Florida. The District Court denied relief, and the Court of Appeals for the Eleventh Circuit affirmed. 828 F. 2d 10 (1987). This evening, less than 11 hours before his death, White filed the instant petition for a writ of certiorari and application for a stay of execution.

II

While the Florida Supreme Court purported to have found White's conduct sufficiently culpable to satisfy the *Enmund* test, it has to date never reconsidered that determination in light of this Court's rereading of *Enmund* in *Tison*. After briefly summarizing how *Tison* modified the *Enmund* inquiry, I will explain why, in my view, the modified analysis demands that we vacate White's death sentence, just as we did in *Tison*, until such time as the Florida courts have established the factual predicate that a majority of this

Court has deemed a constitutional prerequisite to the imposition of a death penalty.

In *Enmund, supra*, at 798, this Court declared that a State may not constitutionally execute a defendant who "did not kill or attempt to kill" and who had no "intention of participating in or facilitating a murder." This Term a majority of this Court departed from that holding when it held in *Tison* that a death penalty could constitutionally be imposed for felony murder. The *Tison* Court assumed for the sake of argument that the Tison brothers "did not 'intend to kill'" in the traditional sense: "Traditionally, 'one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.'" 481 U. S., at 150. (quoting W. LaFave & A. Scott, Criminal Law § 28, p. 196 (1972)). Accordingly the Court rejected the creative attempt of the Arizona Supreme Court (and others) to expand the traditional definition of intent to encompass foreseeable consequences. But the Court held that, *Enmund* notwithstanding, a defendant who did not intend to kill (in that traditional sense) could constitutionally be sentenced to death for "major participation in [a] felony" coupled with "reckless indifference to human life." 481 U. S., at 158 (footnote omitted).

The correctness of the *Tison* overlay on *Enmund* is not at issue here. More relevant to the issue of the proper disposition of this case, is the *Tison* Court's disposition of the case before it. Having assumed that the Tison brothers lacked traditional intent, the Court vacated the sentence and remanded for a determination whether the Tison brothers' participation amounted to "reckless indifference." 481 U. S., at 158. In so doing, it minced no words about its view of the matter: "[T]he record," the Court observed, "would support a finding of the culpable mental state of reckless indifference to human life." *Id.*, at 151; see also *ibid.* ("These facts . . . would clearly support a finding that . . . both [defendants] subjectively appreciated that their acts were likely to result in the taking of innocent life"). Despite its clear leaning, the Court declined to enter the requisite *Tison* findings itself. Nor did it attempt to divine from what the Arizona courts *had* said in applying *Enmund*, what they *would* say in applying the new *Tison* overlay.

The Court's citation to *Cabana* v. *Bullock*, 474 U. S. 376 (1986), suggests that it considered such psychoanalysis improper. Under *Cabana*, "it is [the State] . . . not the federal . . . court, which should first provide [the defendant] with that which he has not yet had and to which he is constitutionally entitled—a reliable determination as to whether he is subject to the death penalty," under whatever standards this Court may most recently have articulated. *Id.*, at 391. As there explained, the right arises not only because justice demands that the same judicial system that sentences a defendant to death find the requisite factual predicate for the sentence, but also because "[c]onsiderations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants . . . ." *Ibid.* (citation omitted).

I see no reason not to extend to White the same constitutional entitlement that we extended to the Tison brothers. Nor does the Florida Supreme Court in this case deserve any less respect than we afforded the Arizona Supreme Court in *Tison*. The state court here no more addressed the *Tison* overlay than did the *Tison* state court. Obviously, it could not have, since at the time of the Florida Supreme Court's last decision on the merits, *Tison* had not yet been decided. See 474 U. S., at 389 ("[T]he [State] Supreme Court obviously was not addressing the specific requirements set forth in *Enmund*, for that case had not yet been decided").

The only conceivable difference then between this case and *Tison* is that here, unlike in *Tison*, this Court assumes (as did the courts below) that the State Supreme Court's pre-*Tison* analysis encompassed some finding that the petitioner *intended*, in (what *Tison* deems) the traditional sense, that his actions would kill the victims. I am willing to make no such assumption, however, when a man's life is at stake. To be sure, the State Supreme Court observed that there came a point (once White's two accomplices overruled his objections to murder) at which "it can hardly be said that he did not realize that lethal force was going to be used in carrying out the robbery." *State* v. *White*, 470 So. 2d, at 1380. It then reiterated its finding that White "stood by while the victims were shot one by one." *Ibid.* (citation and internal quotes omitted). But inaction in the face of an expected murder is a far cry from the traditional definition of intent to kill. The Florida Supreme Court never found that White did anything (after coming to the rude "realiz[ation]" that his co-felons were about to commit murder) to further the murders. Nor did it find that he could have done anything to prevent the murders, short of killing his accomplices or otherwise risking his own life. There is not even any state finding that White had either the time or the freedom to dissociate himself from the sordid affair in the brief interval between the realization and the murders.

Since the death sentence cannot stand without the requisite findings by a state court and the state court's findings are inadequate, I would reverse the judgment of the Court of Appeals. "[T]he District Court should be directed to issue the writ of habeas corpus vacating [White's] death sentence but leaving to the State of [Florida] the choice of either imposing a sentence of life imprisonment or, within a reasonable time, obtaining a determination from its own courts of the factual question" that it never clearly decided—whether White either intended to kill the victims in the traditional sense, or acted with reckless indifference to human life. *Cabana*, *supra*, at 392.

III

This Court's refusal to stay White's execution is inexcusable for yet another reason. It permits the State to put him to death based, in part, on two aggravating circumstances whose application to this case is constitutionally suspect, at best. The trial judge found that the murders committed by White's companions were "especially heinous, atrocious or cruel" and "were committed in an effort to avoid arrest by eliminating witnesses to the crime." *White* v. *State*, 403 So. 2d 331, 338 (Fla. 1981). In *Tison* we left open the issue whether a court may constitutionally attribute to a defendant as an aggravating factor the manner in which other individuals carried out the killings. See 481 U. S., at 146, n. 2; *id.*, at 160, n. 3 (BRENNAN, J., dissenting). Nor has this Court ever addressed the related question whether the purposes for which other individuals committed a crime can be constitutionally attributed to a defendant as an aggravating circumstance. Such vicarious attribution "would seem to violate the core Eighth Amendment requirement that capital punishment be based upon an 'individualized consideration' of the defendant's culpability," *ibid.* (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978)).

No. 87-5363 (A-174). SELBY, AKA PIERRE *v.* COOK, WARDEN, ET AL. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

SEPTEMBER 1, 1987

Dismissal Under Rule 53

No. 86–2045. KIWANIS CLUB OF RIDGEWOOD, INC., ET AL. *v.* KIWANIS INTERNATIONAL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 806 F. 2d 468.

Certiorari Denied

No. 87–5382 (A–180). MITCHELL *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 827 F. 2d 1433.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

Two months ago, we dissented from the Court's decision to deny Billy Mitchell's petition for a writ of certiorari to review his first federal habeas proceeding. *Mitchell* v. *Kemp*, *ante*, p. 1026. We stated then that the failure of Mitchell's attorney to investigate Mitchell's background and character or the circumstances of his crime, and the consequent failure to present any mitigating evidence at the sentencing proceeding, constituted a violation of Mitchell's Sixth Amendment rights. Mitchell's current petition for a writ of certiorari, which reveals yet further instances of his attorney's dereliction and incompetence, only confirms our prior view. We again call upon the Court to give life and meaning to the Sixth Amendment's promise of effective assistance of counsel, and we again dissent.

SEPTEMBER 4, 1987

Miscellaneous Orders

No. A–44 (86–6942). GOREE *v.* CUNNINGHAM. C. A. 6th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-111 (86-2023). SHEPARD *v.* UNITED STATES. C. A. 11th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-121. ROSENTHAL *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Application for stay and other relief, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A-122. ROSENTHAL *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Application for stay and other relief, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D-605. IN RE DISBARMENT OF CLARKE. Disbarment entered. [For earlier order herein, see 479 U. S. 1078.]

No. D-630. IN RE DISBARMENT OF ALLEN. Disbarment entered. [For earlier order herein, see 481 U. S. 1027.]

No. D-635. IN RE DISBARMENT OF FLEISCHER. Disbarment entered. [For earlier order herein, see 482 U. S. 903.]

No. D-636. IN RE DISBARMENT OF BROWN. Disbarment entered. [For earlier order herein, see 482 U. S. 903.]

No. D-641. IN RE DISBARMENT OF WECHSLER. Disbarment entered. [For earlier order herein, see 482 U. S. 911.]

No. D-643. IN RE DISBARMENT OF ROSENBLEET. Disbarment entered. [For earlier order herein, see *ante*, p. 1002.]

No. D-650. IN RE DISBARMENT OF SLOTKIN. It is ordered that Paul Simon Slotkin, of Cherry Hill, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-651. IN RE DISBARMENT OF RIGOLOSI. It is ordered that Vincent Paul Rigolosi, of Hackensack, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-652. IN RE DISBARMENT OF CONWAY. It is ordered that Donald R. Conway, of Hackensack, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-653. IN RE DISBARMENT OF VAUGHN. It is ordered that Paul A. Vaughn, of Danville, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-654. IN RE DISBARMENT OF MILLER. It is ordered that Donald Joseph Miller, of San Mateo, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

SEPTEMBER 8, 1987

Dismissal Under Rule 53

No. 86-2007. SPENCER GIFTS, INC. *v.* CHIPOLLINI. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 814 F. 2d 893.

SEPTEMBER 9, 1987

Dismissal Under Rule 53

No. 86-1878. TENNESSEE VALLEY AUTHORITY ET AL. *v.* ALCO STANDARD CORP. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 808 F. 2d 1490.

Miscellaneous Order

No. A-209. STARVAGGI *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

SEPTEMBER 10, 1987

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE O'CONNOR be, and she is hereby, assigned to the Eleventh Circuit as Circuit Justice, pending further order. The order of July 31, 1987 [*ante*, p. 1041], assigning JUSTICE SCALIA to the Eleventh Circuit as Circuit Justice is vacated.

SEPTEMBER 21, 1987

Miscellaneous Orders

No. A-26 (87-5204). WILLIAMS *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay and other relief, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A-177. MORGAN *v.* FORETICH. Super. Ct. D. C. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D-646. IN RE DISBARMENT OF MADSEN. Disbarment entered. [For earlier order herein, see *ante*, p. 1017.]

No. 86-495. K MART CORP. *v.* CARTIER, INC., ET AL.;
No. 86-624. 47TH STREET PHOTO, INC. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL.; and
No. 86-625. UNITED STATES ET AL. *v.* COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS ET AL. C. A. D. C. Cir. [Certiorari granted, 479 U. S. 1005.] Motion of Yamaha International Corp. et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 86-684. CALIFORNIA *v.* GREENWOOD ET AL. Ct. App. Cal., 4th App. Dist. [Certiorari granted, *ante*, p. 1019.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 86-803. BOOS ET AL. *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. [Certiorari granted, 479

U. S. 1083.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–805. PINTER ET AL. *v.* DAHL ET AL. C. A. 5th Cir. [Certiorari granted, 481 U. S. 1012.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–946. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON, ET AL. *v.* SMITH; and

No. 86–947. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF OREGON, ET AL. *v.* BLACK. Sup. Ct. Ore. [Certiorari granted, 480 U. S. 916.] Motion of American Civil Liberties Union Foundation et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 86–1387. MACKEY ET AL. *v.* LANIER COLLECTION AGENCY & SERVICE, INC. Sup. Ct. Ga. [Certiorari granted, *ante*, p. 1004.] Motion of National Conference of State Legislatures et al. for leave to file a brief as *amici curiae* granted.

No. 86–1415. MARINO ET AL. *v.* ORTIZ ET AL.; and COSTELLO ET AL *v.* NEW YORK CITY POLICE DEPARTMENT ET AL. C. A. 2d Cir. [Certiorari granted, 481 U. S. 1047 and 482 U. S. 912.] Motions of Lawyers' Committee for Civil Rights Under Law, Equal Employment Advisory Council, and National League of Cities et al. for leave to file briefs as *amici curiae* granted.

No. 86–1419. OREGON DEPARTMENT OF HUMAN RESOURCES ET AL. *v.* COOS BAY CARE CENTER ET AL. C. A. 9th Cir. [Certiorari granted, 481 U. S. 1036.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–1430. PERALTA *v.* HEIGHTS MEDICAL CENTER, INC., DBA HEIGHTS HOSPITAL, ET AL. Ct. App. Tex., 1st Dist. [Probable jurisdiction noted, 481 U. S. 1067.] Motion of appellant to dispense with printing the joint appendix granted.

No. 86–1461. EDWARD J. DEBARTOLO CORP. *v.* FLORIDA GULF COAST BUILDING & CONSTRUCTION TRADES COUNCIL ET AL.

C. A. 11th Cir. [Certiorari granted, 482 U. S. 913.] Motion of the Solicitor General for divided argument granted to be divided as follows: 20 minutes for petitioner and 10 minutes for the Solicitor General.

No. 86–1650. TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS. C. A. 8th Cir. [Certiorari granted, 482 U. S. 913.] Motions of Crossover Flight Attendants and Some Working TWA Flight Attendants for leave to file briefs as *amici curiae* granted.

No. 86–6284. SATTERWHITE *v.* TEXAS. Ct. Crim. App. Tex. [Certiorari granted, 482 U. S. 905.] Motion of petitioner for divided argument to permit *amicus curiae* NAACP Legal Defense and Educational Fund, Inc., to present oral argument denied. Motion of Coalition for the Fundamental Rights and Equality of Ex-Patients for leave to file a brief as *amicus curiae* out of time denied.

No. 86–6867. LOWENFIELD *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1005.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

Certiorari Denied

No. 87–5491 (A–234). MCCORQUODALE *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 832 F. 2d 543.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 87–5516 (A–244). MCCORQUODALE *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice O'Connor, and by her referred to the Court, denied. Certiorari denied. Reported below: 829 F. 2d 1035.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 85-1581. Solorio *v.* United States, *ante*, p. 435;

No. 85-1835. California *v.* Rooney, *ante*, p. 307;

No. 85-2064. Greer, Warden *v.* Miller, *ante*, p. 756;

No. 85-2068. Rankin et al. *v.* McPherson, *ante*, p. 378;

No. 86-44. Shearson/American Express Inc. et al. *v.* McMahon et al., 482 U. S. 220;

No. 86-1079. Koczak et al. *v.* Dixon et al., 479 U. S. 1073;

No. 86-1631. Margoles *v.* Johns et al., 482 U. S. 905;

No. 86-1948. Anderson *v.* Oregon State Bar et al., *ante*, p. 1013;

No. 86-5020. Booth *v.* Maryland, 482 U. S. 496;

No. 86-5375. Burger *v.* Kemp, Warden, *ante*, p. 776; and

No. 86-5391. Williams *v.* Louisiana, *ante*, p. 1033. Petitions for rehearing denied.

No. 86-1801. Huntzinger *v.* United States, *ante*, p. 1022. Motion for leave to file petition for rehearing denied.

September 30, 1987

Miscellaneous Order

No. A-251 (87-5546). Franklin *v.* Lynaugh, Director, Texas Department of Corrections. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice White, and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

October 2, 1987

Dismissals Under Rule 53

No. 87-276. **Association for Retarded Citizens of Texas** *v.* **Kavanagh et al.** C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 807 F. 2d 1243.

No. 86-1827. **Guild et al.** *v.* **Brock, Secretary of Labor.** C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 809 F. 2d 753.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1057 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

DEAVER *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A-10. Decided July 1, 1987

An application by a former Government official to stay his imminent perjury trial pending this Court's disposition of his petition for certiorari is denied. After applicant was indicted following an independent counsel's investigation pursuant to the Ethics in Government Act, the District Court denied his motion to dismiss, which was based on a separation-of-powers challenge to that Act, and the Court of Appeals dismissed his appeal because the District Court's order is not a final decision under 28 U. S. C. § 1291. There is a fair prospect that a majority of this Court would not find the decision below erroneous, since the District Court's action did not terminate the litigation, and since applicant's constitutional challenge to the Act is not sufficiently collateral to fall within the limited exception enumerated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, in that consideration of the challenge here would result in piecemeal appellate review of an issue that can properly be presented to the appellate courts if and when applicant is convicted.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant requests that I stay his imminent criminal trial pending this Court's disposition of his petition for certiorari. In certain cases, the Ethics in Government Act, 28 U. S. C. §§ 49, 591–598 (1982 ed. and Supp. III), provides for appointment of an independent counsel to investigate alleged impropriety of Government officials. After an investigation by an independent counsel, applicant was indicted for perjury, and is set to be tried on July 13, 1987. In a motion to dismiss, applicant challenged the constitutionality of the Act, claiming that appointment of an independent counsel violates the separation of powers. The District Court denied the motion.

Applicant appealed, and the Court of Appeals for the District of Columbia Circuit dismissed the appeal because the District Court's order is not a final decision. See 28 U. S. C. § 1291. Applicant has filed a petition for certiorari seeking review of that judgment, and asks that I stay the proceedings below pending disposition of that petition.

The standards for granting a stay pending disposition of a petition for certiorari are well settled. A Circuit Justice is required "'to determine whether four Justices would vote to grant certiorari, to balance the so-called "stay equities," and to give some consideration as to predicting the final outcome of the case in this Court.'" *Heckler* v. *Redbud Hospital District*, 473 U. S. 1308, 1311–1312 (1985) (REHNQUIST, J., in chambers), quoting *Gregory-Portland Independent School District* v. *United States*, 448 U. S. 1342 (1980).

In my view, there is not a fair prospect that a majority of this Court would find the decision below erroneous. "Congress has limited the jurisdiction of the Courts of Appeals to 'final decisions of the district courts.' 28 U. S. C. § 1291. This Court has long held that the policy of Congress embodied in this statute is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation, and that this policy is at its strongest in the field of criminal law." *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 264–265 (1982). It is clear that the District Court's denial of applicant's motion to dismiss did not terminate the litigation. Although applicant claims that his challenge to the constitutionality of the Act is sufficiently collateral to fall within the limited exception enumerated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), I do not think the exception covers this case. "[I]f [applicant's] principle were to be applied, questions as to the constitutionality of the statutes authorizing the prosecution and doubtless numerous other questions would fall under such a definition, and the policy against piecemeal appeals in criminal cases would be swallowed by ever-multiplying exceptions." *Hol-*

lywood Motor Car, *supra*, at 270. There will be time enough for applicant to present his constitutional claim to the appellate courts if and when he is convicted of the charges against him.

Accordingly, the application for a stay and recall of the mandate of the Court of Appeals is

Denied.

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* KENDRICK ET AL.

ON APPLICATION FOR STAY

No. A–99. Decided August 10, 1987

An application by the Secretary of Health and Human Services to stay a District Court order enjoining the enforcement of parts of the Adolescent Family Life Act on constitutional grounds is granted, pending timely docketing of the Secretary's appeal and this Court's ultimate disposition of the case. Given the presumption of constitutionality which attaches to every Act of Congress, it is both likely that the Court will note probable jurisdiction here and appropriate that the statute remain in effect pending such review. Moreover, although the merits of the case are fairly debatable, there is a reasonable prospect that the Court will ultimately reverse the judgment below.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

The applicant requests that I stay an order of the United States District Court for the District of Columbia enjoining the enforcement of parts of the Adolescent Family Life Act, 42 U. S. C. § 300z *et seq.* (1982 ed. and Supp. III). It has been the unvarying practice of this Court so long as I have been a Member of it to note probable jurisdiction and decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional. In virtually all of these cases the Court has also granted a stay if requested to do so by the Government. "The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Walters* v. *National Association of Radiation Survivors*, 468 U. S. 1323, 1324 (1984) (REHNQUIST, J., in chambers). "Given the presumption of constitutionality granted to all Acts of Congress," it is both likely that the Court will note probable jurisdiction here and appropriate that the statute remain in effect pending such review. *Schweiker* v. *McClure*, 452 U. S. 1301, 1303 (1981) (REHNQUIST, J., in chambers).

Respondents contend that the merits of the case are controlled by the Court's recent decisions in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), *Aguilar* v. *Felton*, 473 U. S. 402 (1985), and *Grand Rapids School District* v. *Ball*, 473 U. S. 373 (1985). The District Court agreed with respondents, but the applicant contends that the merits are instead controlled by cases such as *Roemer* v. *Maryland Public Works Board*, 426 U. S. 736 (1976), *Hunt* v. *McNair*, 413 U. S. 734 (1973), and *Tilton* v. *Richardson*, 403 U. S. 672 (1971). The issue seems to me fairly debatable, and I believe that there is a "fair prospect" that the Court will ultimately reverse the judgment below. See *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers).

The application for a stay pending timely docketing of the applicant's appeal and this Court's ultimate disposition of the case is granted.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* GRAY, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL.

ON APPLICATION FOR WRIT OF INJUNCTION

No. A–100. Decided August 14, 1987

An application by the American Trucking Assns., Inc., et al. (ATA) for an injunction requiring respondent Arkansas state officials to establish an escrow fund in which payments of the State Highway Use Equalization (HUE) Tax shall be placed, pending a final decision on the validity under the Commerce Clause of the Federal Constitution of that tax, is granted. After the State Supreme Court sustained the tax's constitutionality in a suit by ATA, this Court vacated that judgment and remanded for further consideration in light of the decision in *American Trucking Assns., Inc.* v. *Scheiner, ante,* p. 266, that two Pennsylvania flat highway use taxes violated the Commerce Clause, whereupon the state court denied ATA's application for temporary escrow relief pending a decision. In light of ATA's and respondents' submissions, there is a "significant possibility" that ATA will succeed on the merits of its challenge to the HUE tax, the effect of which is substantially similarly to that of the Pennsylvania taxes invalidated in *Scheiner.* Moreover, the equities favor the issuance of the requested injunction, since there is a likelihood that applicants will otherwise suffer irreparable injury, in that motor carriers refusing to pay the HUE tax will be barred from the State's highways during the pendency of this case, while carriers that pay the tax may be unable to obtain a refund if the tax ultimately is declared unconstitutional. Conversely, respondents will not be irreparably injured by the issuance of the injunction, which involves only a temporary withholding of revenues rather than a refund.

JUSTICE BLACKMUN, Circuit Justice.

This is an application for an injunction that would require Arkansas state officials to establish an escrow fund in which payments of the Arkansas Highway Use Equalization (HUE) Tax, see Ark. Stat. Ann. §§ 75–817.2 and .3 (Supp. 1985), shall be placed, pending further proceedings challenging the constitutionality of that tax in Arkansas courts. The applicants, American Trucking Associations, Inc., et al. (ATA), brought suit in 1983 to challenge the HUE tax under the

Commerce Clause, Art. I, § 8, cl. 3, of the Federal Constitution. The Chancery Court of Pulaski County sustained the constitutionality of the tax, and a divided Arkansas Supreme Court affirmed. *American Trucking Assns., Inc.* v. *Gray*, 288 Ark. 488, 707 S. W. 2d 759 (1986). ATA appealed to this Court under 28 U. S. C. § 1257(2). We held the case pending our decision in No. 86–357, *American Trucking Assns., Inc.* v. *Scheiner*, which involved a similar constitutional challenge to two flat highway use taxes enacted by the Commonwealth of Pennsylvania. On June 23, 1987, this Court ruled in the Pennsylvania case that the Commonwealth's highway taxes violated the Commerce Clause because "the taxes are plainly discriminatory" in that they impose a heavier burden on out-of-state businesses that compete in an interstate market than they impose on local businesses that engage in similar commerce. *Ante*, at 285–286. The Court explained further that the Pennsylvania taxes failed the "internal consistency" test because "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Ante*, at 284. We then vacated the judgment of the Arkansas Supreme Court and remanded the present case for further consideration in light of *Scheiner*. *Ante*, p. 1014. On July 16, 1987, pursuant to this Court's Rule 52.2, I granted ATA's motion for immediate issuance of the mandate.

Upon remand, ATA moved for further remand to the Chancery Court so that it could petition for a preliminary injunction either to enjoin enforcement of the HUE tax or to order an escrow of the funds collected. The Arkansas Supreme Court denied the motion. It also denied ATA's application for temporary relief, in the form of an escrow, pending decision in this case. That court is now in summer recess and consequently will not consider the merits of ATA's challenge until this fall, at the earliest. Applicants have requested that I order an escrow of the tax revenues pending final disposition of the case on the merits.

Several factors control a single Justice's consideration of an application for writ of injunction pursuant to this Court's Rule 44. If there is a "significant possibility" that the Court would note probable jurisdiction of an appeal of the underlying suit and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted, the Justice may issue an injunction. See *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1327, 1330 (1975) (BLACKMUN, J., in chambers). See also, *e. g.*, *Ledbetter* v. *Baldwin*, 479 U. S. 1309, 1310 (1986) (Powell, J., in chambers); *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers). Applying these principles to the facts before me, I grant the application.

After considering the submissions of applicants and respondents, I have concluded that ATA is likely to succeed on the merits of its challenge to the Arkansas HUE tax. The effect of the HUE tax is substantially similar to that of the Pennsylvania unapportioned flat taxes invalidated in *Scheiner*. For most motor carriers, the HUE tax is a flat amount that is not assessed in proportion to the taxpayer's presence in the State. According to the statistics presented to the Arkansas courts, in its practical operation the tax discriminates against interstate motor carriers whose trucks are registered outside Arkansas. On average, trucks registered outside Arkansas pay a per-mile HUE tax that is more than three times greater than the per-mile tax paid by trucks registered in Arkansas. Respondents argue that the validity of this statistical evidence has not been established. But given the structure of the tax, which benefits trucks that travel extensively within the State, it appears probable that any further analysis would confirm the discriminatory impact. Moreover, the tax exposes trucks that engage in extensive interstate operations to a cumulative tax burden that is not shared by trucks that operate in only one or a few States.

The tax thus works to deter interstate commerce. I therefore find that there is a significant possibility that the Arkansas courts will declare the HUE tax unconstitutional under the "internal consistency" test pronounced by this Court in *Scheiner*. If they fail to do so, I believe that there is a significant possibility that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction and that this Court will reverse the decision.

I have also concluded that the applicants risk irreparable injury absent injunctive relief. Arkansas officials have expressed their intention to continue collecting the HUE taxes during the pendency of the case and have refused to accept payment of the taxes "under protest." Motor carriers operating interstate must pay the annual HUE tax by August 31. If motor carriers refuse to pay the tax pending a determination of its constitutionality, they will be barred from the State's highways and will suffer substantial economic losses. On the other hand, if motor carriers pay the tax, there is a substantial risk that they will not be able to obtain a refund if the tax ultimately is declared unconstitutional. Applicants assert, by way of affidavit, that the Arkansas Highway Department has informed them that, should the tax be invalidated, the State will assert immunity from any subsequent refund order. Respondents have not denied that they will adopt this stance. There is a risk that, like other state courts, the Arkansas courts would deny restitution of taxes found to have been unconstitutionally collected. See, *e. g.*, *Private Truck Council of America, Inc.* v. *New Hampshire*, 128 N. H. 466, 473–477, 517 A. 2d 1150, 1155–1157 (1986); *American Trucking Assns., Inc.* v. *Conway*, 146 Vt. 579, 586–588, 508 A. 2d 408, 413–414 (1986), cert. denied, *ante*, p. 1019. Such a denial would constitute irreparable injury.

For their part, respondents will not be irreparably injured by the issuance of the injunction. Respondents have not argued that the temporary loss of revenues, while the funds are held in escrow, will adversely affect the State's operations.

Rather, they contend that the State will be harmed if the funds are returned to the motor carriers, because the HUE tax is intended to defray the cost of wear on Arkansas' highways attributable to the heavy trucks subject to the tax. But the requested injunction would not direct a refund. If the funds are escrowed and the HUE tax is invalidated, the issue of the appropriate remedy will be a separate matter for the Arkansas courts to determine. On balance, therefore, I conclude that the equities favor issuance of the injunction. Accordingly, I have today entered an order enjoining respondents to escrow the HUE taxes to be collected, until a final decision on the merits in this case is reached.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1984, 1985 AND 1986

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
Terms	**1984**	**1985**	**1986**	**1984**	**1985**	**1986**	**1984**	**1985**	**1986**	**1984**	**1985**	**1986**
Number of cases on dockets	15	10	12	2,575	2,571	2,547	2,416	2,577	2,575	5,006	5,158	5,134
Number of disposed of during term	8	2	1	2,175	2,095	2,105	2,078	2,178	2,254	4,261	4,275	4,360
Number remaining on dockets	7	8	11	400	476	442	338	399	321	745	883	774

	TERMS		
	1984	**1985**	**1986**
Cases argued during term	175	171	175
Number disposed of by full opinions	159	161	164
Number disposed of by per curiam opinions	11	10	10
Number set for reargument	5	1	1
Cases granted review this term	185	187	167
Cases reviewed and decided without oral argument	82	103	113
Total cases to be available for argument at outset of following term	87	101	91

JUNE 26, 1987

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CONSPIRACIES—Continued.

that petitioners conspired to cause corporation to make misrepresentations to Rural Electrification Administration, a credit agency of Department of Agriculture, petitioners' § 371 convictions may stand. Tanner v. United States, p. 107.

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2. *State taxes on trucks.*—Pennsylvania lump-sum annual taxes on operation of trucks on State's highways, consisting of a flat fee for identification markers from which Pennsylvania-registered trucks are exempt and an axle tax on trucks over a specified weight that is offset by a reduction in registration fees for Pennsylvania trucks, are unconstitutional because methods by which they are assessed discriminate against interstate commerce in a way that contradicts Commerce Clause's central purpose of guaranteeing a free trade area among States. American Trucking Assns., Inc. v. Scheiner, p. 266.

II. Confrontation of Witnesses.

Co-conspirator's out-of-court statements.—Where co-conspirator's tape-recorded telephone statements to informant were admissible in evidence against petitioner under Federal Rule of Evidence 801(d)(2)(E), admission of statements did not violate petitioner's rights under Confrontation Clause of Sixth Amendment; a showing of declarant's unavailability is not required where hearsay statement is a co-conspirator's out-of-court declaration nor is an independent inquiry into reliability required where evidence falls within a firmly rooted hearsay exception, such as co-conspirator exception. Bourjaily v. United States, p. 171.

III. Double Jeopardy.

Murder prosecution—Breach of plea agreement.—Double Jeopardy Clause did not bar prosecution of respondent for first-degree murder following his breach of a plea agreement under which he had pleaded guilty to second-degree murder and had been sentenced and imprisoned. Ricketts v. Adamson, p. 1

IV. Due Process.

Preponderance of evidence standard—Paternity determinations.—Under Fourteenth Amendment, Pennsylvania's preponderance of evidence

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standard is appropriate burden of proof for determining paternity rather than clear and convincing standard required in parental rights termination cases. Rivera v. Minnich, p. 574.

V. Eighth Amendment.

Mandatory death sentence—Prisoner convicted of murder.—Nevada statute that mandates death penalty for prison inmate convicted of murder while serving life sentence without possibility of parole, under which respondent was sentenced to death for murdering a fellow prisoner, violates Eighth and Fourteenth Amendments. Sumner v. Shuman, p. 66.

VI. Eminent Domain.

Land-use permit requirement—Public purpose.—Conditioning issuance of rebuilding permit on granting a public-access easement would be a lawful land-use regulation if it substantially furthered governmental purposes that would justify denial of permit; imposition of access-easement condition, permitting public to cross petitioner's property from one public beach to another, is not an exercise of land-use regulation power because condition does not serve public purpose related to permit requirement. Nollan v. California Coastal Comm'n, p. 825.

VII. Establishment of Religion.

Religious organizations—Employment discrimination based on religion—Exemption from prohibition.—Applying § 702 of Civil Rights Act of 1964—which exempts religious organizations from Act's prohibition of religious discrimination in employment—to religious organizations' secular activities does not violate Establishment Clause; thus, § 702 could be applied to shield religious organizations affiliated with Mormon Church from liability for discharging an employee from a nonprofit facility run by those organizations because he was not a member of Church and eligible to attend its temples. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, p. 327.

VIII. Extradition.

Federal court's authority.—Holding of *Kentucky* v. *Dennison*, 24 How. 66, that federal courts have no power to order a State Governor to fulfill State's obligation under Extradition Clause to deliver up fugitives from justice can stand no longer; thus, it need not be determined what applicability that Clause, which refers only to "States," may have to Commonwealth of Puerto Rico, which may now predicate on Extradition Act without regard to Clause's direct applicability its mandamus action in Federal District Court to compel Iowa to deliver a fugitive who fled there after being released on bail following his arraignment on felony charges in Puerto Rico. Puerto Rico v. Branstad, p. 219.

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IX. Fifth Amendment.

1. *Deficit Reduction Act of 1984—Aid to Families with Dependent Children—Filing unit—Rational-basis standard.*—Deficit Reduction Act of 1984 provision amending Aid to Families with Dependent Children program to require that families include in their filing unit all children living in same home, including those for whom support payments are being received, does not violate Fifth Amendment due process and equal protection principles; appropriate standard of review is whether Congress had a "rational basis" for its decision to amend program. Bowen v. Gilliard, p. 587.

2. *Governmental actor—United States Olympic Committee.*—United States Olympic Committee is not a governmental actor to which Fifth Amendment applies. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, p. 522.

X. Freedom of Speech.

1. *Discharge of employee.*—Discharge of respondent from her job as a clerical employee in a county constable's office for remarking, after hearing of an attempt on President's life, "If they go for him again, I hope they get him," violated her First Amendment right to freedom of expression. Rankin v. McPherson, p. 378.

2. *Use of word "Olympic"—Trademark—Commercial speech.*—Congressional grant to United States Olympic Committee of limited property right in word "Olympic" falls within scope of trademark law protection and, thus, within bounds of First Amendment; exclusive use of word "Olympic" could be granted without requiring that authorized user prove unauthorized use is likely to cause confusion, even where unauthorized user claims an expressive rather than purely commercial purpose. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, p. 522.

XI. Privilege Against Self-Incrimination.

1. *Murder trial—Admission of psychiatric report—Rebuttal of defendant's evidence.*—Admission in evidence at petitioner's murder trial of psychiatric report proffered by prosecution to rebut petitioner's psychological evidence presented as affirmative mental-status defense did not violate petitioner's Fifth Amendment rights where his counsel had requested examination; under these circumstances, prosecution could rebut petitioner's evidence without implicating his privilege against self-incrimination. Buchanan v. Kentucky, p. 402.

2. *Murder trial—Postarrest silence—Single question by prosecutor.*—Prosecutor's single question concerning respondent's postarrest silence, when followed by an immediate objection and jury instructions to disregard questions to which objections had been sustained, did not violate respondent's right to remain silent after arrest guaranteed by Due Process

CONSTITUTIONAL LAW—Continued.

Clause of Fourteenth Amendment; prosecutor's misconduct in attempting to use postarrest silence to impeach respondent did not so infect trial with unfairness so as to make resulting conviction a denial of due process. Greer v. Miller, p. 756.

XII. Right to Counsel.

1. *Conflict of interest—Ineffective assistance of counsel—Failure to present mitigating circumstances.*—Appointment of partners to represent petitioner and coindictee in separate trials did not so infect petitioner's attorney's representation as to constitute a conflict of interest violative of petitioner's right to counsel under Sixth Amendment; attorney's decision not to develop and present mitigating evidence at either of two state-court death sentencing hearings was supported by reasonable professional judgment. Burger v. Kemp, p. 776.

2. *Murder trial—Admission of psychiatric report—Rebuttal of defendant's evidence.*—Admission in evidence at petitioner's murder trial of psychiatric report proffered by prosecution to rebut petitioner's psychological evidence presented as affirmative mental-status defense did not deny petitioner his Sixth Amendment right to effective assistance of counsel. Buchanan v. Kentucky, p. 402.

XIII. Right to Testify.

Exclusion of hypnotically refreshed testimony.—Arkansas' rule prohibiting admission of hypnotically refreshed testimony violated petitioner's right under Due Process Clause of Fourteenth Amendment, Compulsory Process Clause of Sixth Amendment, and Fifth Amendment's privilege against self-incrimination to testify on her own behalf as a defendant at her manslaughter trial. Rock v. Arkansas, p. 44.

XIV. Right to Trial by Impartial Jury.

Murder trial—"Death qualification" of jury.—In joint murder trial in which death penalty was sought only against petitioner's codefendant, petitioner was not deprived of his Sixth Amendment right to an impartial jury, representative of a fair cross section of community, because prosecution was permitted to "death qualify" jury. Buchanan v. Kentucky, p. 402.

XV. Searches and Seizures.

1. *Summary judgment—Qualified immunity—Warrantless searches—Third parties' home.*—FBI agent who participated in warrantless search is entitled to summary judgment on qualified immunity grounds if he can establish as a matter of law that a reasonable officer could have believed that search comported with Fourth Amendment requirement that persons be protected from unreasonable searches and seizures even though search actually did not; there is no exception from principle of qualified immunity in

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cases involving allegedly unlawful warrantless searches of innocent third parties' home in search of fugitives. Anderson v. Creighton, p. 635.

2. *Warrantless searches—Probationer's home.*—Warrantless search of petitioner's residence, pursuant to Wisconsin regulation authorizing a probation officer to conduct a warrantless search of a probationer's home when his supervisor approves and there are "reasonable grounds" to believe that contraband is present, was reasonable within meaning of Fourth Amendment because regulation is a reasonable response to "special needs" of probation system. Griffin v. Wisconsin, p. 868.

XVI. Spending Power.

Highway funds—Withholding from State based on permissible drinking age.—Even if Congress, in view of Twenty-First Amendment, might lack power to impose directly a national minimum drinking age, indirect encouragement of state action to obtain uniformity in States' drinking ages, pursuant to 23 U. S. C. § 158 (1982 ed., Supp. III)—which directs Secretary of Transportation to withhold a percentage of otherwise allocable federal highway funds from States in which purchase or public possession of any alcoholic beverage by a person less than 21 years of age is lawful—was a valid use of spending power; thus, South Dakota, which by statute permits persons 19 or older to purchase beer, was not entitled to declaratory judgment that § 158 violates limitations on congressional exercise of spending power and Twenty-First Amendment. South Dakota v. Dole, p. 203.

XVII. State's Immunity from Suit.

Jones Act—Consent to suit.—Court of Appeals' judgment affirming District Court's dismissal of employee's personal injury action against Texas Highway Department on grounds that (1) Congress failed to include in Jones Act an unmistakably clear expression of its intention to abrogate States' Eleventh Amendment immunity from suit in federal court, and (2) Texas had not consented to being sued under Jones Act, is affirmed. Welch v. Texas Dept. of Highways and Public Transportation, p. 468.

XVIII. Taking of Property.

Aid to Families with Dependent Children program—Filing unit.—Deficit Reduction Act of 1984 amendment to Aid to Families with Dependent Children program requiring that filing unit include children for whom support payments are being received does not violate Takings Clause of Fifth Amendment. Bowen v. Gilliard, p. 587.

CONTINGENT FEE. See **Attorney's Fees.**

COURTS-MARTIAL. See **Jurisdiction, 1.**

COURTS OF APPEALS. See **Jurisdiction, 2.**

CRIMINAL LAW. See also **Conspiracies; Constitutional Law,** II; III; V; VIII; XI–XV; **Federal Rules of Evidence.**

1. *Juror alcohol and drug use—Right to hearing.*—District Court did not err in refusing to hold an evidentiary hearing at which jurors would testify on juror alcohol and drug use during petitioners' criminal trial; such testimony was barred by Federal Rule of Evidence 606(b), and a hearing was not required under petitioners' Sixth Amendment right to trial by a competent and unimpaired jury. Tanner v. United States, p. 107.

2. *Mail fraud—Improper jury charge.*—In prosecution of petitioners for allegedly violating mail fraud statute, 18 U. S. C. § 1341, by devising a scheme to defraud Kentucky's citizens and government of their "intangible right" to have Kentucky's affairs conducted honestly, trial court's charge to jury that such a scheme could be made out in either of two specified ways permitted a conviction for conduct not within reach of § 1341, which is limited to protection of money and property rights and does not extend to citizenry's intangible right to good government. McNally v. United States, p. 350.

"DEATH QUALIFICATION" OF JURY. See **Constitutional Law,** XIV.

DEATH SENTENCES. See **Constitutional Law,** V; XII, 1.

DEDUCTIONS FROM TAXABLE INCOME. See **Internal Revenue Code.**

DEFICIT REDUCTION ACT OF 1984 (DEFRA). See **Constitutional Law,** IX, 1; XVIII.

DISCHARGE OF EMPLOYEES. See **Constitutional Law,** VII; X, 1.

DISMISSAL OF CERTIORARI. See **Certiorari.**

DOUBLE JEOPARDY. See **Constitutional Law,** III.

DRINKING AGE. See **Constitutional Law,** XVI.

DUE PROCESS. See **Constitutional Law,** IV; IX, 1; XI; XIII.

EASEMENT. See **Constitutional Law,** VI.

EFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law,** XII.

EIGHTH AMENDMENT. See **Constitutional Law,** V.

ELECTRIC COOPERATIVES. See **Conspiracies.**

ELEVENTH AMENDMENT. See **Constitutional Law,** XVII.

EMINENT DOMAIN. See **Constitutional Law,** VI.

EMPLOYER AND EMPLOYEES. See **Constitutional Law,** VII; X, 1.

EMPLOYMENT DISCRIMINATION. See **Constitutional Law, VII.**

EQUAL PROTECTION. See **Constitutional Law, IX, 1.**

ESTABLISHMENT OF RELIGION. See **Constitutional Law, VII.**

EVIDENCE. See **Constitutional Law, II; XI, 1; XII, 2; XIII; Federal Rules of Evidence.**

EXEMPTION OF RELIGIOUS ORGANIZATIONS FROM PROHIBITED EMPLOYMENT DISCRIMINATION. See **Constitutional Law, VII.**

EXPRESSIVE SPEECH. See **Constitutional Law, X, 2.**

EXTRADITIONS. See **Constitutional Law, VIII.**

FAIR LABOR STANDARDS ACT.

"Hot goods"—Prohibition against shipment—Application to secured creditors.—Section 15(a)(1) of Act, which prohibits "any person" from introducing into interstate commerce goods produced in violation of Act's minimum wage and overtime pay provisions ("hot goods"), applies to holders of collateral obtained pursuant to a security agreement and thus applied to petitioner who had a security interest in clothing manufacturer's inventory pursuant to a financing agreement and when manufacturer began to fail financially took possession of inventory, part of which had been manufactured during period when manufacturer's employees were not paid. Citicorp Industrial Credit, Inc. v. Brock, p. 27.

FEDERAL COURTS' AUTHORITY TO ORDER EXTRADITION. See **Constitutional Law, VIII.**

FEDERAL HIGHWAY FUNDS. See **Constitutional Law, XVI.**

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL RULES OF EVIDENCE. See also **Constitutional Law, II; Criminal Law, 1.**

Co-conspirator's out-of-court statements—Admissibility.—Pursuant to Federal Rule of Evidence 801(d)(2)(E), which provides that a statement is not hearsay if it is made "by a co-conspirator of a party during the course and in furtherance of the conspiracy," a co-conspirator's tape-recorded telephone statements to an informant were properly admitted in evidence against petitioner during his trial on charge, *inter alia*, of conspiring to distribute cocaine. Bourjaily v. United States, p. 171.

FEDERAL-STATE RELATIONS. See **Constitutional Law, VIII, XVI.**

FIFTH AMENDMENT. See **Constitutional Law, IX; XI, 1; XIII; XVIII.**

FIRST AMENDMENT. See **Constitutional Law, VII; X.**

FOURTEENTH AMENDMENT. See **Constitutional Law,** IV; V; XI, 2; XIII.

FOURTH AMENDMENT. See **Certiorari; Constitutional Law,** XV.

FRAUD AGAINST THE UNITED STATES. See **Conspiracies.**

FREEDOM OF SPEECH. See **Constitutional Law,** X.

GOODS PRODUCED IN VIOLATION OF FAIR LABOR STANDARDS ACT. See **Fair Labor Standards Act.**

HIGHWAY FUNDS. See **Constitutional Law,** XVI.

"HOT GOODS." See **Fair Labor Standards Act.**

HYPNOTICALLY REFRESHED TESTIMONY. See **Constitutional Law,** XIII.

IMMUNITY FROM SUIT. See **Constitutional Law,** XV, 1; XVII.

IMPROVIDENT GRANTS OF CERTIORARI. See **Certiorari.**

INCOME TAXES. See **Internal Revenue Code.**

INEFFECTIVE ASSISTANCE OF COUNSEL. See **Constitutional Law,** XII.

INJUNCTION.

Escrow fund.—Application for an injunction requiring respondent to establish an escrow fund in which challenged tax payments are to be placed pending final decision on constitutionality of tax, is granted. American Trucking Assns., Inc. v. Gray (BRENNAN, J., in chambers), p. 1306.

INSTRUCTIONS TO JURY. See **Criminal Law,** 2.

INTERNAL REVENUE CODE.

Surrender of shares to corporation—Loss deduction from taxable income.—Respondent dominant shareholders, who voluntarily surrendered a portion of their shares to corporation for which they received no consideration but who retained control of corporation, did not sustain an immediate loss entitling them to deduct from taxable income their basis in surrendered shares; rather, a surrendering shareholder must reallocate his basis in surrendered shares to shares he retains. Commissioner v. Fink, p. 89.

INTERSTATE COMMERCE. See **Constitutional Law,** I; **Fair Labor Standards Act.**

IOWA. See **Constitutional Law,** VIII.

JONES ACT. See **Constitutional Law,** XVII.

JUDICIAL REVIEW. See **Certiorari.**

JURIES. See **Criminal Law.**

JURISDICTION.

1. *Courts-martial—Status as member of Armed Forces.*—Art. I, § 8, cl. 14, conditions proper exercise of court-martial jurisdiction solely on accused's status as a member of Armed Forces, not on "service connection" of offense charged. Solorio v. United States, p. 435.

2. *Interlocutory appeal—Reinstatement of previously dismissed claim.*—Court of Appeals jurisdiction in interlocutory appeal is limited to order appealed from and does not permit court to reinstate claim dismissed in a different order. United States v. Stanley, p. 669.

JUROR ALCOHOL AND DRUG USE DURING TRIAL. See **Criminal Law**, 1.

JURY INSTRUCTIONS. See **Criminal Law**, 2.

KENTUCKY. See **Criminal Law**, 2.

LAND-USE REGULATION. See **Constitutional Law**, VI.

LANHAM ACT. See **Amateur Sports Act.**

LIMITATION OF ACTIONS. See **Statutes of Limitations.**

LOSS DEDUCTIONS FROM TAXABLE INCOME. See **Internal Revenue Code.**

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MANDATORY DEATH SENTENCES FOR PRISONERS CONVICTED OF MURDER. See **Constitutional Law**, V.

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MENTAL-STATUS DEFENSES. See **Constitutional Law**, XI, 1; XII, 2.

MILITARY PERSONNEL. See **Armed Forces; Jurisdiction**, 1.

MINIMUM DRINKING AGES. See **Constitutional Law**, XVI.

MINIMUM WAGE PROVISIONS OF FAIR LABOR STANDARDS ACT. See **Fair Labor Standards Act.**

MURDER. See **Constitutional Law**, III; V; XI; XII, 2; XIV.

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"OLYMPIC". See **Amateur Sports Act; Constitutional Law**, X, 2.

OVERTIME PAY PROVISIONS OF FAIR LABOR STANDARDS ACT. See **Fair Labor Standards Act.**

PATERNITY. See **Constitutional Law**, IV.

PENNSYLVANIA. See **Constitutional Law**, I, 2; IV.

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PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** XI; XIII.

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PSYCHIATRIC EXAMINATIONS. See **Constitutional Law,** XI, 1; XII, 2.

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RATIONAL-BASIS STANDARD OF REVIEW. See **Constitutional Law,** IX, 1.

RELIGIOUS DISCRIMINATION IN EMPLOYMENT. See **Constitutional Law,** VII.

RIGHT OF CRIMINAL DEFENDANT TO TESTIFY. See **Constitutional Law,** XIII.

RIGHT TO CONFRONT WITNESSES. See **Constitutional Law,** II.

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RIGHT TO FREEDOM OF EXPRESSION. See **Constitutional Law,** X, 1.

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RIGHT TO JURY TRIAL. See **Criminal Law,** 1.

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SOUTH DAKOTA. See **Constitutional Law,** XVI.

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SPENDING POWER OF CONGRESS. See **Constitutional Law,** XVI.

STATE DRINKING AGES. See **Constitutional Law,** XVI.

STATE MANUFACTURING TAXES. See **Constitutional Law,** I, 1.

STATE TAXES ON OPERATION OF TRUCKS. See **Constitutional Law,** I, 2.

STATE WHOLESALE TAXES.

Jurisdiction to tax.—Activity in State of Washington of sales representative for appellant out-of-state manufacturer supported State's jurisdiction to tax appellant's wholesale sales to in-state customers; showing of sufficient nexus could not be defeated by argument that sales representative was properly characterized as an independent contractor rather than an agent. Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, p. 232.

STATUTES OF LIMITATIONS.

RICO civil enforcement action—Clayton Act statute of limitations as applicable.—Four-year statute of limitations applicable to Clayton Act civil enforcement action applied in respondent's Racketeer Influenced and Corrupt Organizations Act civil enforcement action against petitioners arising out of respondent's termination as an insurance agent; hence, where action was filed less than four years after respondent's termination, which was earliest time RICO action could have accrued, action was timely. Agency Holding Corp. v. Malley-Duff & Associates, Inc., p. 143.

STAYS.

1. *Enforcement of Adolescent Family Life Act.*—Application to stay District Court's order enjoining enforcement of parts of Adolescent Family Life Act on constitutional grounds, is granted pending filing and disposition of a certiorari petition. Bowen v. Kendrick (REHNQUIST, C. J., in chambers), p. 1304.

2. *Perjury trial.*—Application to stay applicant's perjury trial pending disposition of petition for certiorari, is denied. Deaver v. United States (REHNQUIST, C. J., in chambers), p. 1301.

SUMMARY JUDGMENT. See **Constitutional Law,** XV, 1.

SUPREME COURT. See also **Certiorari.**

1. Retirement of JUSTICE POWELL, p. VII.
2. Term Statistics, p. 1311.

SURRENDER OF STOCK SHARES TO CORPORATION. See **Internal Revenue Code.**

TAKING OF PROPERTY. See **Constitutional Law,** VI; XVIII.

TAXES. See **Constitutional Law,** I; **Internal Revenue Code; State Wholesale Taxes.**

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WARRANTLESS SEARCHES. See **Certiorari; Constitutional Law,** XV.

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WHOLESALE TAXES. See **State Wholesale Taxes.**

WISCONSIN. See **Constitutional Law,** XV, 2.

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